Supreme Court, U.S.
FILED

96 828 AUG 13 1996

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 1995

The Dry Creek Rancheria,

Petitioner,

vs.

In re Bridget and Lucy R., Minors, Cindy R. and
Richard A., James and Collette R., and
the Superior Court of Los Angeles County,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeal of the State of California
Second Appellate District, Division Three

Petition for Writ of Certiorari

Lester J. Marston (Counsel of Record)
Rapport and Marston
200 W. Henry Street
Post Office Box 488
Ukiah, California 95482
Telephone: (707) 462-6846
Attorneys for Petitioner

95 1pp

QUESTIONS PRESENTED

1. Should the Indian Child Welfare Act, 25 U.S.C. §1901 et seq. ("ICWA"), apply only to those Indian Children that fall within the "Existing Indian Family" exception created by the California Court of Appeal or should it apply to all children who meet the definition of an "Indian Child" as defined by Congress in the ICWA?

2. Does the term "Indian Child" as defined by Congress in the Indian Child Welfare Act, classify certain children by their race in violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution or is the term a constitutionally permissible political classification enacted by Congress pursuant to its plenary power derived from the Indian Commerce Clause of the United States Constitution?

3. In the absence of the "Existing Indian Family" exception adopted by the California Court of Appeal, does the Indian Child Welfare Act infringe on the State's reserved powers to regulate domestic affairs in violation of the Tenth Amendment to the United States Constitution?

4. Does the Act require that the minor Indian children involved in this case, be returned to the custody of their natural parents, where the parents consent to relinquish their children for adoption was obtained in violation of the ICWA?

PARTIES TO THE PROCEEDING

The following are all of the parties to this proceeding: (1) Dry Creek Rancheria, a federally recognized Indian Tribe; (2) Bridget and Lucy R., minor children; (3) Cindy R. and Richard A., natural parents of the minor children; (4) James and Collette R., potential adoptive parents and (5) the Superior Court of Los Angeles County.

Title 28 of the United States Code §2403(a) may apply to these proceedings. The Solicitor General of the United States has been served with a copy of this Petition for Writ of Certiorari as required by Rule 29(4)(b) of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING i
TABLE OF AUTHORITIES v
CITATION TO THE OPINION BELOW xi
JURISDICTION OF THIS COURT xii
CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED xii
STATEMENT OF THE CASE xiii
REASONS FOR GRANTING THE WRIT 1

I. The Decision Below Judicially Creating An "Existing Indian Family" Exception To The Indian Child Welfare Act, Conflicts With The Express Provision Of The Act And The Decisions Of Other State Courts Of Last Resort Interpreting The Act 1

A. Congress Enacted The ICWA To Protect Indian Children And Promote Security Of Indian Tribes By Establishing Minimum Federal Standards For The Placement Of Indian Children In Foster Or Adoptive Homes 1

B. The Decision Below Conflicts With The Express Provisions Of The ICWA And The Decisions Of Other State Courts Interpreting The ICWA 2

II. The Decision Below Conflicts With The Relevant Decisions Of This Court In Holding That Without The "Existing Indian Family" Exception The Definition Of "Indian Child" Contained In The Indian Child Welfare

Act Constitutes An Impermissible Racial Classification . 4

III. By Holding That The ICWA Violates The Tenth Amendment To The United States Constitution, The Decision Of The Court Below Conflicts With The Decisions Of This Court Which Have Held That The Commerce Clause Of The United States Constitution Vests Congress With The Exclusive Authority To Legislate In The Area Of Indian Affairs 7

A. The Tenth Amendment Standard 7

B. The States Have Delegated All Of Their Authority Over Indian Affairs To The Federal Government, And Thus Retain No Power In This Area Under The Tenth Amendment 9

IV. The Court Below, In Adopting The "Existing Indian Family" Exception To The Indian Child Welfare Act, Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court 14

A. The Decision Below Is Preempted By The Indian Child Welfare Act And Violates The Supremacy Clause Of The United States Constitution 14

B. The Decision Below Does Not Consider The Historical Relationship Between Tribal Governments And The United States 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279 (C.D. Cal. 1969), aff'd, 442 F.2d 1184 (9th Cir. 1971) 10

Bryan v. Itasca County, 426 U.S. 373 (1976) 12

California v. Cabazon, 480 U.S. 202 (1987) 12

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 15

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.), 1 (1831) 16

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 9, 13

Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) 15, 16

Dick v. United States, 208 U.S. 340 (1908) 12

Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977) 17

Duncan v. United States,
667 F.2d 36 (Ct.Cl. 1981),
cert. denied, 463 U.S. 1228 (1983) 17

Fisher v. District Court,
424 U.S. 382 (1976) 5, 7

Florida Lime & Avocado Grower v. Paul,
373 U.S. 132 (1963) 15

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 8

Harjo v. Duello,
484 U.S. 1072 (1988) 4

Hodel v. Virginia Surface Mining &
Reclamation Assn., Inc.,
452 U.S. 264 (1981) 8, 9

Lac Courte Oreilles Band of Lake Superior
Chippewa Indians v. Voigt,
700 F.2d 341 (7th Cir. 1983) 10

Mississippi Choctaw Indian Band v. Holyfield,
490 U.S. 30 (1989) 4

Morton v. Mancari,
417 U.S. 535 (1974) 5, 6, 7

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 12

New York v. United States,
505 U.S. 144 (1992) ..... passim

Oneida County, N.Y. v. Oneida Indian Nation of N.Y.,
470 U.S. 226 (1985) 9, 10

Perrin v. United States,
232 U.S. 478 (1914) 11

Ramah Navajo School Board v. Department of Revenue,
458 U.S. 832 (1982) 12

Seminole Nation v. United States,
316 U.S. 286 (1942) 16

Smith v. United States,
515 F.Supp. 56 (N.D. Cal. 1978) 17

Superintendent v. Seymour,
368 U.S. 351 (1962) 12

U.S. v. Antelope,
430 U.S. 641 (1977) 5, 6, 7

United States v. Darby,
312 U.S. 100 (1941) 8

United States v. Forty-Three Gallons of Whiskey,
93 U.S. 188 (1876) 10, 11

United States v. Lopez,
_____ U.S. _____, 115 S. Ct.. 1624 (1995) 12, 13

United States v. Nice,
241 U.S. 591 (1916) 11

Warren Trading Post Co. v. Arizona Tax Commission,
380 U.S. 685 (1965) 15

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 9, 10, 15

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 11, 12

STATE CASES:

Claymore v. Serr,
405 N.W.2d 650 (S.D. 1987) 3

In Re Adoption of Lindsay C.,
229 Cal. App. 3d 404 (1991) 4

In re Baby Boy L.,
231 Kan. 199 (1982) 3, 17

In re Bridget R.,
41 Cal. App. 4th 1483 ..... passim

In re Crystal K.,
226 Cal. App. 3d 655 (1990) 4

In Re Custody of S.B.R.,
43 Wn. App. 622 (1986) 4

In re Junious M.,
144 Cal. App. 3d 786 (1983) 4

In The Matter of Adoption of Crews,
118 Wn. 2d 561 (1992) 3

Matter of Adoption of a Child of Indian Heritage,
111 N.J. 155 (1988) 4

Matter of Adoption of Baby Boy D.,
742 P.2d 1059 (Oh., 1985)
cert. denied by Hario v. Duello,
484 U.S. 1070 (1988) 3

Matter of Adoption of T.R.M.,
525 N.E.2d298 (Ind., 1988) 3

Matter of Appeal in Maricopa County,
136 Ariz. 528 (1983) 4

Matter of the Adoption of Baade,
462 N.W.2d 485 (S.D. 1990) 4

UNITED STATES CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Article I, Section 8, Clause 3
(Indian Commerce Clause) ..... passim

U.S. Constitution, Article IV, Clause 3
(Supremacy Clause) 11, 14, 15, 16

U.S. Constitution - Fifth Amendment
(Due Process Clause) 5, 7

U.S. Constitution - Tenth Amendment 7, 8, 13, 14

U.S. Constitution - Fourteenth Amendment
(Equal Protection Clause) 5, 7

STATUTES

Indian Child Welfare Act of 1978,
25 U.S.C. §1901 et seq. ..... passim

The California Rancheria Act of 1958,
72 Stat. 69, as amended by Act of
Aug. 11, 1964, 68 Stat. 390 17

MISCELLANEOUS

F. Cohen, Handbook of Federal Indian Law
(1942 ed.) 11

F. Hoxie, The Final Promise: The Campaign To
Assimilate The Indians, (1984 ed.) 17

The Federalist No. 42. p. 284
(J. Chic, ed. 1961) 10

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

IN RE BRIDGET and LUCY R., Minors, CINDY R. and RICHARD A., JAMES and COLLETTE R., and THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

Petitioner, Dry Creek Rancheria, prays that a writ of certiorari issue to review the judgment of the California Court of Appeal for the Second Appellate District entered in this proceeding on January 18, 1996.

CITATION TO THE OPINION BELOW

The opinion of the California Court of Appeal for the Second Appellate District is reported as In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeal for the Second Appellate District of California was entered on January 18, 1996. On February 14, 1996 the Court of Appeal filed its Order Denying Petition for Rehearing and Modifying Opinion, a copy of which is attached to this petition as Appendix B. A petition for review was filed with the California Supreme Court on February 26, 1996 and was denied on May 15, 1996. A copy of the California Supreme Court's Order denying the petition for review is attached to this Petition as Appendix C.

This petition is timely filed within ninety (90) days of May 15, 1996. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Sections 1257(a) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States which vests in the Congress of the United States the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The Due Process Clause of the Fifth Amendment of the United States Constitution, which guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Tenth Amendment to the Constitution of the United States which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1, which state that no State shall ". . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indian Child Welfare Act of 1978, codified in Title 25 of the United States Code, Section 1901 et seq. A copy of the Indian Child Welfare Act is attached to this petition as Appendix D.

STATEMENT OF THE CASE

The Dry Creek Rancheria ("Tribe") is a federally recognized Indian Tribe and the beneficial owner of the Dry Creek Rancheria ("Reservation") located in Sonoma County, California (CT 2109). The Reservation comprises approximately seventy-five (75) acres of land, legal title to which is held by the United States of America in trust for the benefit of the Tribe (CT 3050-3051).

The Dry Creek Tribal Council is the governing body of the Reservation and is recognized as such by the United States government through the Secretary of the Interior (CT 3062, 3100-105).

The Tribe is organized under Articles of Association ("Constitution") which were adopted by the Tribe on April 16, 1973 (CT 3062, 3100-105) and which, as subsequently amended, were approved by the Secretary of the Interior on August 22, 1979 (RT1 217).

Prior to the adoption of the Constitution, the Tribe governed

itself in accordance with the customs and traditions of the Tribe (RT1 248). Pursuant to the Constitution and the customs and traditions of the Tribe, any person who is a descendant of a person whose name appears on the Tribe's original June 4, 1915 Tribal roll is a member of the Tribe at birth (RT1 8).

Pursuant to the Tribe's Constitution and the customs and traditions of the Tribe, Richard A (CT 2107; RT1 20), the natural father of Bridget and Lucy, and Bridget and Lucy R. are now, and always have been, members of the Tribe since their birth (RT 354-355).

Lucy and Bridget R. are twins, born on November 9, 1993 (CT1, 885), to Cindy R. and Richard A. (CT 3-4).

Richard and Cindy discovered that Cindy was pregnant in mid-1993. Richard was 21 years old, and Cindy was 20 (RT 1024). The couple were living with their two sons, Anthony, then age two, and Richard Andrew, age one, and felt that they could not afford to take care of any more children at that time (RT 617). The young couple went to see Durand Cook, an attorney specializing in adoptions, about placing the twins for adoption, in August, 1993, (RT 889).

Durand Cook undertook representation of both the R's, a non-Indian couple seeking to adopt, and Richard and Cindy. Cook received a fee of $4,200 from the R's for the adoption, and no fee from the birth parents (RT 909; 919).

Richard did not tell his parents about Cindy's pregnancy or the plan to place the twins for adoption because he felt his mother would be disappointed in him and because he felt ashamed (RT 649; 819). His family was already providing emotional support

and financial assistance to Richard and Cindy. Cook was aware that Richard had not informed his parents of Cindy's pregnancy or the adoption plan (RT 896).

In Cook's office, Richard filled out an intake questionnaire indicating that he was a Pomo Indian (CT 2080). The trial court found that Richard gave Cook information that he was a member of an Indian tribe (RT 1026) and that Cook became aware at the initial interview that there was an issue with regard to the ICWA and that he "wanted everybody to bury their heads and not face this issue." (RT 122; RT 1104-1105).

As an adoption attorney, Cook knew that if Bridget and Lucy were Indian children, he would have to notify the prospective adoptive parents and the Tribe (RT 1019-20). Richard had never heard of the ICWA before his August, 1993, meeting with Cook (RT 833).

Upon learning that Richard was Indian, Cook told Richard that if he disclosed this information to the R's, the adoption would be stopped (RT 639) and his mother would be told about it (RT 849). Cook then gave Richard a second form to fill out (RT 639). The two forms were identical, except that on the second one Richard omitted the information that he was an Indian (RT 642). Cook did not explain to Richard that he would have rights under the ICWA, such as to have the twins placed with a tribal foster family, or that Richard and Cindy would have the right to change their minds later about any pre-adoptive placement (RT 646-648). The trial court found that Cook had "sent a message, which was, Let's not get into the Indian Child Welfare Act in this case, because it's only going to complicate the matter'" and found that but for Cook's actions, the dispute over the twins would not have

occurred (RT 1106).

After the meeting with Cook, Richard did not disclose the fact he was an Indian to the R's because of what Cook had told him (RT 612; 820). Cook did not disclose the fact that the twins were Indian to Vista Del Mar Child and Family Services ("Vista Del Mar"), the licensed adoption agency which arranged the adoption for the R's.

Richard and Cindy signed relinquishments for the twins less than ten days after the birth of the twins, and not before a judge (RT 539-540) as required under 25 U.S.C. §1913(a). Within two months after signing the papers, Richard regretted his decision and wanted his daughters back. He told his mother, Karen A., what had happened and asked for her help (RT 841). Karen A. contacted the Tribe and informed them about the birth and relinquishment of the twins. On March 9, 1994, Amy Martin, the Chairperson of the Tribe, sent a letter to Vista Del Mar, stating that the twins were Indian children and that the Tribe wished to have them placed with an Indian family, pursuant to the ICWA (CT 2009). Vista Del Mar refused to accede to this request.

Richard then sent a letter to Vista Del Mar withdrawing his consent to the adoption and asking for the return of the twins on April 22, 1994, five and a half months after the twins were placed with the R's (CT 2896; RT 605-606).

The R's refused to return the twins, and instead filed a petition, in the State of Ohio on May 4, 1994, to adopt the twins without providing notice to the Tribe. They filed a petition to terminate Richard and Cindy's rights in Los Angeles Children's Court on September 13, 1994.

The Los Angeles Children's Court ("trial court") appointed a psychologist, Dixie Noble, who met with and evaluated both families and filed a report with the trial court on January 20, 1994 (CT 3206-3418). In her report, Ms. Noble concluded that returning the children to the birth family was in Bridget and Lucy's best interests. She recommended a temporary guardianship with the paternal grandparents Karen and Richard A. (Sr.) until Richard and Cindy could "get on their feet financially." (CT 3205-3418).

The twins had visits with their birth family in December, 1994, and in the home of their grandparents Karen and Richard A. (Sr.), before the trial. Visitations were halted when the California Court of Appeal, Second District, Division Three, ("Court of Appeal") granted the R's writ of supersedeas.

On September 13, 1994, the R's filed a petition to terminate the parental rights of Richard A. and Cindy R. to their twin daughters Lucy and Bridget R. based on allegations of abandonment. On October 13, 1994, the Tribe filed a Motion to Intervene pursuant to the ICWA (CT 13). Vista Del Mar filed a Motion to Consolidate Actions and a declaratory relief action to determine the applicability of the ICWA (CT 128).

On November 3, 1994, the trial court consolidated the two actions. On November 16, 1994, the Tribe filed a Motion to Declare Applicability of the ICWA and for Immediate Return of Lucy and Bridget to their parents (CT 243). The Tribe's Motion to Intervene was granted on December 8, 1994, (RT 67).

On May 17, 1995, the trial court issued a finding of fact that Bridget and Lucy are Indian children within the meaning of the ICWA, that they are members of the Tribe, and that Richard A.

had been a member of the Tribe since his birth under tribal custom (RT 354-355). After a trial, the trial court ruled the relinquishments of the minors invalid (RT 556), and subsequently made a finding of fact that there had been no abandonment (RT 1102). The trial court ordered the return of the minors to their family and appointed paternal grandparents Karen and Richard A. (Sr.) as temporary guardians for a 90-day transition period.

On June 14, 1995, Respondents herein filed a Notice of Appeal, a Petition for Writ of Supersedeas, and a Petition for Writ of Mandate with the Court of Appeal. The Court of Appeal granted the Writ of Supersedeas and, on January 18, 1996, issued its decision reversing the trial court and remanding the case for additional hearings on whether the natural parents have significant social, cultural or political ties to the Tribe, and on the issue of a guardianship for the minors. The birth parents and the Tribe filed Petitions for rehearing, which were denied on February 14, 1996.

The Tribe filed a petition for review of the Court of Appeal's decision with the California Supreme Court on February 26, 1996. The California Supreme Court denied the Tribe's petition on May 15, 1996, necessitating the filing of this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Judicially Creating An "Existing Indian Family" Exception To The Indian Child Welfare Act, Conflicts With The Express Provision Of The Act And The Decisions Of Other State Courts Of Last Resort Interpreting The Act

A. Congress Enacted The ICWA To Protect Indian Children And Promote The Security Of Indian Tribes By Establishing Minimum Federal Standards For The Placement Of Said Children In Foster Or Adoptive Homes.

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") 25 U.S.C. §§1901-1963) ". . . to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, ..." 25 U.S.C. §1902.

Application of the ICWA is triggered by a child custody proceeding involving an Indian child. As defined by the ICWA, a "child custody proceeding" refers to proceedings for foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C. §1903(1). "Indian child" is defined as "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . .." 25 U.S.C. §1903(4). Finally, "`Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . .." 25 U.S.C. §1903(8).

At the heart of the ICWA are its provisions establishing procedural and substantive standards for Indian child custody proceedings that take place in state court. 25 U.S.C. §§1901-1915. With respect to voluntary adoptive placements, the ICWA: (1) prohibits Indian parents from voluntarily consenting to a termination of parental rights, unless such consent is "executed in writing and recorded before a Judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . .." (25 U.S.C. §1913(a).); (2) allows the parent "prior to the entry of a final decree of termination or adoption" to withdraw his or her consent "for any reason." (25 U.S.C. §1913(c).); (3) provides that the Indian parent may withdraw his/her consent to an adoption, even after "the entry of a final decree of adoption", if the consent was obtained through "fraud or duress" (25 U.S.C. §1913(d).); (4) requires that absent "good cause" to the contrary that adoptive placement be made preferentially with: (A) members of the child's extended family; (B) other members of the same tribe, or (C) other Indian families (25 U.S.C. §1915(a).) and (5) mandates that no "termination of parental rights proceedings can be held "until at least ten days" after the Indian child's tribe has received notice of the pendency of the proceedings and of its right to intervene in the case. 25 U.S.C §1912(a). Violation of any of these provisions constitutes cause for invalidating the proceedings and returning custody of the Indian child to its parents (25 U.S.C. §1914).

B. The Decision Below Conflicts With The Express Provisions Of The ICWA And The Decisions Of Other State Courts Interpreting The ICWA.

By its own express terms, the ICWA is applicable to this case. It is uncontroverted that: Bridget and Lucy R are Indian Children within the meaning of the ICWA, the Tribe of which Richard A, Bridget R. and Lucy R. are members is an Indian tribe under the ICWA (RT1 217) and that this case involves a "child custody proceedings"

under the ICWA since it sought to terminate the parental rights of Richard A., 25 U.S.C. §§1903(4), (5) and (8) and 1903(1).

Furthermore, it is undisputed that the decision of the Court of Appeal violates the express provisions of the ICWA. Richard A. never validly consented to a relinquishment of the twins for adoption as required by the ICWA (i.e., consent was never given in writing in open Court before a judge who freely informed Richard A. of his rights, including his rights under the ICWA (RT 539-540)). 25 U.S.C. §1913(a). Nor was any attempt made to place the twins with an Indian family, let alone a member of the twins' extended family or members of the Tribe as is mandated by the ICWA. 25 U.S.C. §1915(a). Finally, Richard A. had an absolute right under the ICWA to withdraw his consent to the adoptive placement "for any reason at any time prior to the entry of a final decree of termination or adoption." 25 U.S.C. §1913(c). Richard A. withdrew his consent to put the twins up for pre-adoptive placement (CT 2896; RT 605-606) prior to a "final decree of termination or adoption."

Rather than return the twins to their parents as mandated by the ICWA, 25 U.S.C. §1913(c), the Court of Appeal found the ICWA inapplicable based upon the decision of the Kansas State Supreme Court in Matter of Adoption of Baby Boy L (1982) 231 Kan. 199, which refused to apply the ICWA to an Indian child who had never "lived in an Indian family." In Re Bridget R. (1996) 41 Cal.App 4th 1483, 1498. The Baby Boy L decision is the leading case in a number of state court decisions that have carved out a judicial exception to the applicability of the ICWA, known as the "existing Indian family" exception. Generally, these cases hold the ICWA inapplicable in adoption proceedings involving an illegitimate Indian child who in the eyes of the courts has never been a member of an Indian home or participated in Indian culture, and who is being given up by his or her non-Indian mother. (See, Matter of Adoption of T.R.M. (Ind., 1988) 525 N.E. 2d.298, 303; Claymore v. Serr (S.D., 1987) 703 S.W. 2d 603, 609; In Re Adoption of Crews (1992) Wash 118 Wn. 2d.561; Matter of Adoption of Baby Boy D. (Oh., 1985) 742 P.2d 1059, 1064, cert.

den. by Harjo v. Duello, 484 U.S. 1072 (1988) and Matter of Appeal in Maricopa County (1983) 136 Ariz. 528.)

However, not all courts have adopted this view. (See, e.g., Matter of Adoption of a Child of Indian Heritage (1988) 111 N.J. 155; In re Custody of S.B.R. (1986) 43 Wn. App. 622; Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d 485; In re Crystal K (1990) 226 Cal.App. 3d 655; In re Junious M. (1983) 144 Cal.App 3d. 786; and In Re Adoption of Lindsay C. (1991) 229 Cal.App. 3d 404.) These latter decisions, the majority of which were decided after this Court's decision in Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30, have held that the applicability of the ICWA is contingent only upon whether an "Indian child" is the subject of a "child custody proceeding" as those terms are defined by the ICWA. Matter of Adoption of Baade (S.D. 1990) 462 N.W. 2d. 485, 490; In re Junious M.(1983) 144 Cal.App. 3d 786, 796.

If the Court of Appeal had followed this latter line of decisions, it would have sustained the decision of the trial court which ordered the twins returned to the custody of their natural parents.

This Court must grant this petition to ensure that federal law is not violated, that the Congressional purpose of protecting and preserving Indian Tribes is not undermined and to resolve the conflict among the state courts that the "existing Indian family" exception has created regarding the applicability of the ICWA. Unless this Court grants the Tribe's petition herein and resolves this issue once and for all there will be no uniform rule of federal law that is consistently applied to all Indian children throughout the United States.

II. The Decision Below Conflicts With The Relevant Decisions Of This Court In Holding That Without The "Existing Indian Family" Exception The Definition Of "Indian Child" Contained In The Indian Child Welfare Act Constitutes An Impermissible Racial Classification.

Again, it is uncontroverted that Bridget and Lucy R. are Indian children within the meaning of the ICWA (RT 354-355). It is also undisputed that the Tribe of which the twins are members, is an "Indian Tribe" within the meaning of the ICWA (CT 2109).

Nevertheless, the Court of Appeal refused to comply with the ICWA and order the children returned to the custody of their natural parents. In so holding, the Court of Appeal concluded that:

> ". . . if the Act applies to children whose families have no significant relationship with Indian tribal culture, such application runs afoul of the Constitution . . . on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children . . ..

In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 1511-1512 (original emphasis).

This holding is contrary to the decisions of this Court which have consistently held that legislation passed by Congress to benefit Indians does not violate the equal protection standard of the Fifth and Fourteenth Amendments to the United States Constitution. United States v. Antelope, 430 U.S. 641, 645-47 (1977); Fisher v. District Court, 424 U.S. 382, 390-91 (1976); Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

In United States v. Antelope, this Court stated that federal regulation of Indian affairs is not based upon impermissible racial classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of tribes, therefore, is governance of once sovereign political communities; it is not to be viewed as legislation of a "'racial' group, consisting of Indians . . .." Id. at 390-91.

Thus, when Congress legislates with respect to Indians, the

federal government is dealing with Tribal citizens, members of quasi-sovereign governmental entities, (i.e., tribal governments) not persons of a particular race. United States v. Antelope, 430, U.S. 641, 645-46 (1977).

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Morton v. Mancari, 417 U.S. 535, 554, n. 24 (1974).

Likewise, under the ICWA, Congress is not classifying persons on the basis of race but based upon their tribal citizenship as enrolled members of a federally recognized Indian tribe or a child of a parent enrolled with a federally recognized Indian tribe and who is himself or herself eligible for enrollment. 25 U.S.C. §1903(3), (4) and (5).

Unless reversed on review by this Court, the decision below not only calls into question the constitutionality of the ICWA but all federal legislation that applies to enrolled members of federally recognized Indian Tribes.

> Literally every piece of legislation dealing with Indian tribes and reservations, . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25

> U.S.C.) [25 U.S.C.S.] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Morton v. Mancari 417 U.S. 535, 552 (1974).

The decision below is contrary to the decisions of this Court in Antelope, Fisher, and Morton. Moreover, the decision calls into question the constitutionality of literally every piece of legislation passed by Congress affecting Indians as tribal citizens. For this reason alone, this Court should grant review of this case to determine whether the ICWA, without the "existing Indian family" exception violates the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

III. By Holding That The ICWA Violates The Tenth Amendment To The United States Constitution, The Decision Of The Court Below Conflicts With The Decisions Of This Court Which Have Held That The Commerce Clause Of The United States Constitution Vests Congress With The Exclusive Authority To Legislate In The Area Of Indian Affairs.

A. The Tenth Amendment Standard.

The Tenth Amendment to the United States Constitution makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In New York v. United States, 505 U.S. 144, (1992), this Court noted that historically it has viewed Tenth Amendment cases in either of two ways. Some cases have examined whether the act of Congress in question was "authorized by one of the powers delegated to Congress in Article I of the Constitution," Id. at 155, while other cases have

sought to determine whether a congressional act "invades the province of state sovereignty reserved by the Tenth Amendment." Id. at 155.

In New York v. United States this Court recognized that:

> the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of the State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

Id. at 156 (emphasis added). Thus "the Tenth Amendment `states but a truism that all is retained which has not been surrendered.'" Id. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941).). This Court has consistently recognized that the States retain a significant measure of sovereign authority, but only "to the extent that the Constitution has not divested them of their original powers and transferred those power to the Federal Government.'" Id. at 156 (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1985).)

In order to achieve its objectives "Congress may not simply `commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" New York v. United States at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).). However, "where Congress has the authority to regulate private activity under the Commerce Clause," this Court has:

> recognized Congress' power to offer States the choice of regulating that activity according to federal standards or

> having State law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes. These include the Clean Water Act; the Occupational Safety and Health Act of 1970; the Resource Conservation and Recovery Act of 1976; and the Alaska National Interest Lands Conservation Act.

Id. (quoting Hodel, 452 U.S. 289) (citations omitted).)

These are the precepts that this Court has established in determining whether an act of Congress violates the Tenth Amendment.

B. The States Have Delegated All Of Their Authority Over Indian Affairs To The Federal Government, And Thus Retain No Power In This Area Under The Tenth Amendment.

Section eight of Article I of the United States Constitution enumerates the powers granted to Congress. Clause three of section eight provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, §8, Cl. 3.

This Court has held that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985). Thus congressional power to legislate concerning Indian affairs is plenary. (See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); White Mountain Apache Tribe

v. Bracker, 448 U.S. 136, 142 (1980); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 361 (7th Cir. 1983); Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279, 282 (C.D. Cal. 1969), aff'd 442 F.2d 1184 (9th Cir. 1971).

It is no accident that the States have, in the Constitution, delegated all of their authority over Indian affairs to the federal government. Both the national government and the States experienced difficulties in their dealings with Indian tribes under the Articles of Confederation. This Court has noted that "[James] Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1 § 8, Cl. 3, that granted Congress the power to regulate trade with the Indians. The Federalist No. 42, p. 284 (J. Chic, ed. 1961)." Oneida County, N.Y., 470 U.S. at 234 n. 4, (1985). Long ago this Court explained that:

> Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate Commerce with the Indian Tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876).

In his classic treatise, Handbook of Federal Indian Law, Felix Cohen, then-Chairman of the Board of Appeals, Department of the Interior, noted that "[t]he Congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between States." F. Cohen, Handbook of Federal Indian Law, p. 91 (1942).[1]

As Chief Justice John Marshall noted in his opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the powers given to Congress to make war and peace, to make treaties, and to regulate Commerce with the Indian Tribes "comprehend all that is required for the regulation of our intercourse with the Indians." Id. at 559.

This Court in Worcester declared as unconstitutional Georgia laws which infringed on the tribal sovereignty of the Cherokee Nation. Id. at 561. As Chief Justice Marshall stated, those laws "interfere[d] with, and attempt[ed] to regulate and control the intercourse with the said Cherokee Nation, which, by the said constitution, belongs exclusively to the [C]ongress of the United States." Id. 540 (emphasis added). The Chief Justice also found support for his decision from the Supremacy Clause, Article IV Clause 3 of the Constitution. Marshall

---

[1]The Indian Commerce Clause has supported legislation concerning transactions by which Indians sought to dispose of land or other property in exchange for money or goods. See United States v. Nice, 241 U.S. 591 (1916), Perrin v. United States, 232 U.S. 478 (1914). In addition, it has provided authority to regulate areas such as travel, crimes by whites against Indians or Indians against whites, survey of land, trespass and settlement by whites in Indian country, fixing boundaries, and the furnishings of goods, services and currency by the Federal Government. See Cohen, supra, at 92.

argued that the recognition in the Constitution of treaties previously made with the Indian tribes as the "supreme law of the land" was an explicit recognition of the sovereign status of the tribes. Id. at 559.

Read in the narrowest possible sense, Worcester stands for the proposition that the states, by ratifying the Constitution, granted to Congress the exclusive authority to legislate in the area of Indian affairs. Id. This Court has always recognized the power of Congress to restrict and direct the activities of State governments with respect to Indian affairs. In Dick v. United States, 208 U.S. 340, 353, (1908), this Court upheld a congressional restriction on State liquor sales to Indians outside of reservation boundaries. In so doing, this Court found that Congressional authority "is superior and paramount to the authority of any State within whose limits are Indian tribes . . .. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes." Id.

In addition to liquor sales, State authority over reservation activities has been found by this Court to be preempted by federal law in a wide variety of contexts over the years. These include State taxation of Indians, Bryan v. Itasca County, 426 U.S. 373, (1976) and non-Indians, Ramah Navajo School Board v. Department of Revenue, 458 U.S. 832, (1982). In addition, States have no independent or inherent authority to prosecute Indians for crimes committed on the reservation, Superintendent v. Seymour, 368 U.S. 351, (1962), or to regulate on-reservation hunting and fishing, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, (1983).

Finally, this Court has held that the States have no jurisdiction over Indians or non-Indians engaging in on-reservation gaming activities. California v. Cabazon, 480 U.S. 202 (1987).

Despite this overwhelming authority to the contrary, the Court of Appeal, relying on this Court's decision in United States v. Lopez, _ U.S. __, 115 S.Ct. 1624 (1995), held that the ICWA, without the "existing Indian family" exception, impermissibly intrudes upon the

State's power to regulate domestic or family relations in direct violation of the Tenth Amendment to the United States Constitution. In Re Bridget R. (1996) 41 Cal.App 4th 14 at, 1512.

The Court of Appeal's reliance on United States v. Lopez to support its holding is misplaced for two reasons. First, Lopez dealt with the authority of Congress under the Interstate Commerce Clause as opposed to the Indian Commerce Clause of the United States Constitution. As this Court stated in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989):

> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, [citations omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs [citation omitted]. . .

Id. at 192.

Second, in Lopez, this Court addressed the issue of Congress's authority, under the Interstate Commerce Clause, to legislate in areas, otherwise reserved to the States (i.e., possession of firearms at a school.) (United States v. Lopez, __U.S. __, at __, 115 S.Ct. at 1630.) As shown above, the States have no authority to regulate Indian affairs having granted Congress the sole and exclusive authority to legislate in this area by ratifying the United States Constitution. U.S. CONST. Art. I, §8, cl.3. As stated above, where "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any

reservation of that power to the States" New York v. United States, 505 U.S. at 156. Thus, the States retain no power whatsoever over Indian affairs within the meaning of the Tenth Amendment. Because this power "is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . ." Id.

To erase any doubts that Congress has exclusive authority under the Indian Commerce Clause to legislate in the area of Indian affairs and to ensure that over one hundred years of precedents of this Court holding that Congress' power over Indian affairs is plenary are not violated, this Court must grant this writ.

IV. The Court Below, In Adopting The "Existing Indian Family" Exception To The Indian Child Welfare Act, Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

A. The Decision Below Is Preempted By The ICWA And Violates The Supremacy Clause Of The United States Constitution.

In its decision, the Court of Appeal has created additional criteria for defining who is or is not an Indian for the purpose of determining whether a child will be afforded the protection of the ICWA.

In the ICWA, Congress has said that an Indian Child is a minor who is an enrolled member of a federally recognized Indian tribe, a tribal citizen, or the minor child of a parent who is an enrolled member of a federally recognized Indian tribe. 25 U.S.C. §1903(3), (4), and (5). Despite the plain wording of the ICWA, the Court of Appeal has held that this is not enough. According to the Court of Appeal, to be an Indian child under the ICWA, you must not only be an enrolled member of a federally recognized Indian tribe but also a child that

maintains "significant social, cultural, or political relationships with Indian community life . . .." In Re Bridget R. (1996) 41 Cal. App. 4th 1483, 1511.

This "existing Indian family" exception adopted by the Court of Appeal places additional burdens on the comprehensive ICWA statutory scheme, something which Congress never contemplated. Such additional burdens stand as an obstacle to the purposes and policies of the ICWA, that is, to prevent Indian children who are tribal citizens from being removed from their Indian parents, who are also tribal citizens. Since the present case is governed by the express provisions of the ICWA, federal law preempts the authority of the states to legislate on the subject or, as in this case, judicially create additional criteria defining who is an Indian child.

> . . . by enacting these statutes, Congress "has undertaken to regulate Reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." . . .

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980); See also, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151-353 (1980), Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691, n. 18 (1965).

The decision below not only runs afoul of the express provisions of the ICWA but also Congress' exclusive authority under the Indian Commerce Clause (U.S. CONST. art. I, §8, cl.3.) to legislate in the area of Indian Affairs in direct violation of the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl.3.

An important policy consideration in this Court's Supremacy Clause cases is whether or not there is an apparent need for national uniformity in a federal scheme, (Florida Lime & Avocado Grower v. Paul, 373 U.S. 132, 144 (1963) or whether the state laws in question discriminate against a federally-protected interest. Department of

Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973).

If left standing, the decision below prevents a uniform application of the ICWA. Instead of applying to all tribal citizens, the ICWA's application will hinge on such factors as whether the Indian child ever lived on a reservation, attended a tribal cultural event or participated in a tribal religious ceremony. Such criteria could result in the ICWA applying to one child and not applying to another child of the same family. As is evident from this example, the "existing Indian family" exception adopted by the Court of Appeal, will prevent national uniformity in the federal scheme established by Congress in the ICWA and discriminate against those tribal citizens who have had minimal contact with their reservation and tribe. This Court cannot allow such a result to continue, as that would be inconsistent with the Supremacy Clause. U.S. CONST. art. VI, cl. 3.

B. The Decision Below Does Not Consider The Historical Relationship Between Tribal Governments And The United States.

As Chief Justice John Marshall observed in Cherokee Nation v. Georgia, 30 U.S. (Pet.) 1 (1831), "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . .. [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. Id. at 16. The government-to-government relationship between the Indian tribes and the United States is premised upon both the federal constitutional "plenary power" over Indian affairs, described in Arguments II and III above, but also upon the special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

Although the United States conduct towards the Indians is judged by the most exacting fiduciary standards, the United States has repeatedly adopted policies and legislation, the intent of which was to

assimilate the Indians into white society and bring an end to the tribes' reservations, governments and culture. (See, generally, F. Hoxie, *The Final Promise: The Campaign To Assimilate The Indians*, p. 1880-1920 (1984).)

The California Rancheria Act of 1958, 72 Stat. 619, as amended by Act of Aug. 11, 1964, 68 Stat. 390, was just such legislation. Its intent was to "terminate" the governmental status, the individual Indian status and the reservation status of forty-one Indian tribes in California. Duncan v. United States, 667 F. 2d 36 (Ct. cl. 1981), cert. denied 463 U.S. 1228 (1983). In implementing the Rancheria Act, the United States breached the specific provisions of the Rancheria Act and illegally terminated many of the forty-one Indian tribes named in the Act. See, e.g. Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977); and Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978).

The County of Appeal decision does not take into account the fact that many of the Indians in California were illegally terminated by the United States in the 1950's and 60's pursuant to the Rancheria Act. As a direct result, many of these Indians lost all political, social, and cultural contact with their tribal governments and reservations through forced government relocation programs and because their reservations and tribes were terminated. Id.

It would be a sad, ironic twist of fate, if Indians were deprived of the protections of the ICWA, a statute passed by Congress to protect tribal existence, because they could not prove to the satisfaction of a state court that they had maintained social, cultural and political ties with their tribe and reservation, when the very cause of those ties being severed was the illegal conduct of the United States. Id.

It has been fourteen years since the Kansas Supreme Court first adopted the "existing Indian family" exception to the ICWA. Matter of Adoption of Baby Boy L. (1982) 231 Kan. 199. Since that time, no less than six state courts of last resort have had an opportunity to consider the adoption or rejection of the exception with varying results. See,

Argument I above.

Until this Court decides this important issue of federal law, there will be no uniform national application of the ICWA and the intent and purpose of Congress in enacting the ICWA will be frustrated. For this reason, this Court should grant the Tribe's writ.

CONCLUSION

This case raises important jurisdictional issues pertaining to the constitutionality of the Indian Child Welfare Act and the authority of Congress to define who is an "Indian child" within the meaning of the ICWA. The decision below calls into question whether legislation enacted by Congress pertaining to Indians constitutes invidious racial discrimination.

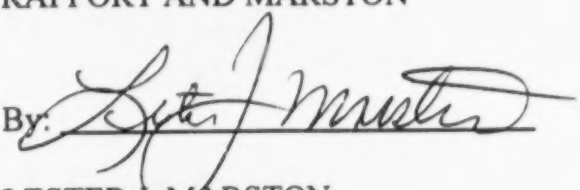
If left standing, the decision below has the potential of jeopardizing the entire political relationship between the United States and the Indian tribes by allowing states, acting through their state courts, to define, for the first time in the history of this nation, who is or is not an Indian.

If a U.S. citizen takes his one year old son to Japan to live for ten years, does the boy lose his United States' citizenship because he now speaks only Japanese, practices only the Buddhist religion and only goes to Japanese cultural and social events? No! Not without the child's father expressly relinquishing his son's United States Citizenship. Likewise, Lucy and Bridget R. have not lost their tribal citizenship simply because they have been placed, in violation of federal law, with a non-Indian couple. Richard A has never relinquished his tribal citizenship, he is an enrolled member of a federally recognized Indian tribe, as are his children. He is an Indian and his children are Indians as defined by Congress under the ICWA.

Because this case raises important constitutional issues of first impression, and for the other reasons stated above, this Court should grant the Tribe's petition for Writ of Certiorari.

Dated: August 13, 1996

Respectfully submitted,
RAPPORT AND MARSTON

By: 

LESTER J. MARSTON
ATTORNEYS FOR PETITIONER
DRY CREEK RANCHERIA

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re BRIDGET R., et al., Minors.	
JAMES R. AND COLETEE R., & VISTA DEL MAR, Petitioners and Appellants, v. CINDY R. AND RICHARD A. Objectors and Respondents. DRY CREEK RANCHERIA, ET AL., Intervenors and Respondents.	B093520 (Super.Ct.No. BN1980 consol. w/ BC114849)
In re BRIDGET R., ET AL., MINORS.	B093694
JAMES R. AND COLETTE R., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CINDY R., RICHARD A., AND DRY CREEK RANCHERIA, Real Parties in Interest.	

APPEAL from an order of the Superior Court of Los Angeles County. John Henning, Judge. Reversed and remanded with directions.

John L. Dodd and Jane A. Gorman for Petitioners and Appellants, the adoptive parents [identified in the opinion as the "R's"]; Michael F. Kanne for Petitioner and Appellant Vista Del Mar Child and Family Services.

James E. Cohen for Intervenor and Respondent, for Dry Creek Rancheria.

Mitchell L. Beckloff for Respondent Minors, Janette Freeman Cochran, Robert S. Gerstein, for Biological Parents, Farella, Braun & Martel, Norma G. Formanek, Jennifer Schwartz, Joan Heifetz Hollinger, Mark C. Tilden, Alexander & Karshmer, Barbara Karshmer, Sant' Angelo & Trope, Jack F. Trope, Robert J. Miller, Patricia D. Hinrichs, Dunaway & Cross, Michael P. Bentzen, Cary W. Mergele, Wylie, McBride, Jesinger, Sure & Platten, Christopher E. Platten, Marc Gradstein, Mark D. Fiddler, Todd D. Steenson and Randall B. Hicks as Amici Curiae.

California recognizes the principle that children are not merely chattels belonging to their parents, but rather have fundamental interests of their own. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) Such fundamental interests are of constitutional dimension. This principle is central to our resolution of the multiple and complex issues presented by this case.

We reverse an order of the trial court made pursuant to sections 1913 and 1914 of the Indian Child Welfare Act of 1978 (25 U.S.C.A. §§ 1901 et seq.; hereafter "ICWA" or "the Act"). The court's order invalidated a voluntary relinquishment of parental rights respecting Bridget and Lucy R., twin two-year-old girls, and ordered the twins removed from their adoptive family, with whom they have lived since birth, and returned to the extended family of the biological father. The adoptive parents (hereafter the "R's" or "adoptive parents") appealed,[1] joined by the licensed adoption agency through which the

---

[1]A notice of appeal was filed by the R's on June 14,1995. On June 15, 1995, they filed a petition for writ of supersedeas or other appropriate stay of the trial court's order for an immediate transfer of custody. On that same date, we issued a temporary stay.

On June 21, 1995, the R's filed their Petition for Writ of Mandate, in which they raised the same issues as are raised on appeal. By three separate orders, each entered July 5, 1995, we (1) set a hearing on the petition for writ of supersedeas for July 19, 1995; (2) ordered proceedings on the petition for writ of mandate to be consolidated with the appeal and ordered the parties to appear before this court on October 18, 1995, to show cause why the writ of mandate should not be granted; and (3) ordered the appeal expedited and propounded questions to be addressed by the parties.

twins were placed.[2]

The twins are of American Indian descent, and the within dispute over their prospective adoption and custody raises issues concerning the scope of ICWA. Specifically, it raises the question of whether the Act should be limited in its application, as some courts have limited it, to children who not only are of Indian descent, but also belong to an "existing Indian family." (See, e.g., *In re Adoption of Crews* (1992) 118 Wash.2d 561 [825 P.2d 305]; *Matter of Adoption of Baby Boy L.* (1982) 231 Kan. 199 [643 P.2d 168].) We conclude that question must be answered in the affirmative.

ICWA was enacted by Congress to protect the best interests of Indian children and promote the stability of Indian tribes and families (25 U.S.C.A.§ 1902; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32-37 [104 L.Ed. 2d 29, 109 S.Ct. 1997]; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 408.) To

---

On July 21, 1995, after the hearing of July 19 on the petition for writ of supersedeas, we granted the writ of supersedeas, staying all orders and judgments which are the subject of the appeal.

[2]The twins are separately represented and also have filed a responsive brief, in which they support the position of the adoptive parents and the adoption agency. This represents a change of position from the twins' position at trial. Indeed, the twins have been represented by three different attorneys over the course of these proceedings and have shifted sides in the controversy with each change of attorney. The attorney who originally was appointed to represent the twins filed pleadings on their behalf in which he argued that application of ICWA without holding a hearing on their best interests would deprive them of due process of law. When that attorney subsequently recalled that he had once been consulted by the adoption agency concerning this case, he was replaced by a second attorney, who took the opposite position. Counsel on appeal has returned to the position taken by the twins' first attorney.

this end, ICWA requires, among other things, that any voluntary termination of parental rights respecting an Indian child be (1) executed in writing, (2) recorded before a judge, and (3) executed more than ten days after the birth of the child. (25 U.S.C.A., § 1913, subd. (a).) Any consent not meeting these requirements is invalid and may be declared so at any time by a court of competent jurisdiction upon petition by the child, the Indian parent or custodian, or the child's tribe. (25 U.S.C.A., § 1914.)

Here, the twins' biological parents, Richard A. ("Richard") and Cindy R. ("Cindy"), initially relinquished the twins to appellant Vista Del Mar Child and Family Services ("Vista Del Mar") pursuant to section 8700 of California's Family Code for adoption by the R.'s, a non-Indian couple. However, Richard and Cindy later purported to withdraw their consent. With the assistance of the Dry Creek Rancheria of Pomo Indians, the federally recognized Indian tribe from which Richard is descended (hereafter, the "Tribe"), they initiated proceedings under ICWA to invalidate their relinquishments of parental rights. It is undisputed that the relinquishments were not executed in the manner required by ICWA. It is also undisputed that Richard and the twins are now recognized by the Tribe as tribal members. However, the record raises substantial doubt as to whether Richard, who, at all relevant times, resided several hundred miles from the tribal reservation, ever participated in tribal life or maintained any significant social, cultural or political relationship with the Tribe.

Although urged by Vista Del Mar and the R's to apply the "existing Indian family doctrine" in this case, and uphold the relinquishments of parental rights unless the biological parents established that they were such a family, the trial court declined to apply that doctrine or hold any hearing with respect thereto. The court simply declared the relinquishments invalid as violative of ICWA and ordered the twins placed in the custody of their paternal grandparents, who were appointed temporary guardians. The trial court also dismissed a petition by the adoptive parents to terminate the biological

parent's parental rights on the ground of abandonment. (Fam. Code, § 7822.) The court found ICWA precluded it from proceeding on that petition.

As we explain, recognition of the existing Indian family doctrine is necessary in a case such as this in order to preserve ICWA's constitutionality. We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe. Because the factual issues raised by such a rule have not been resolved, we reverse the trial court's order and remand the case for a determination of whether the twins' biological parents had such a relationship at the time that they voluntarily acted to relinquish their parental rights under California law. In the event that the trial court, after consideration of all the evidence, determines that such a relationship did not exist, then those relinquishments will be valid and binding and ICWA will not bar any pending adoption proceedings. On the other hand, if the trial court finds the biological parents did have a significant social, cultural or political relationship with the Tribe, and therefore the provisions of ICWA can properly be applied, then a further guardianship hearing will be required to resolve the question of whether the twins should be removed from the custody of the R's.

FACTUAL BACKGROUND[3]

Bridget and Lucy, twin girls, were born on November 9, 1993, in Los Angeles County, California, to Richard and Cindy. He is of

---

[3]The facts we recite are taken from the record of testimony and other evidence presented to the trial court and are substantially undisputed.

American Indian descent, while she is descended from the Yaqui tribe of Mexico.[4] Richard is three-sixteenths Pomo and is currently an enrolled member of the Tribe.

The Tribe, which occupies a reservation in Sonoma County, in northern California, has approximately 225 enrolled members, of whom approximately twenty-five live on the reservation. Since 1973, the Tribe has been governed by a set of Articles of Association, which, among other things, establish the qualifications of tribal membership. Under the Articles, such membership includes all persons who (1) have completed an application for membership, and (2) are named in a June 4, 1915 Bureau of Indian Affairs census of Indians "in, near and up Dry Creek from Healdsburg" and Indians "in and near Geyserville," or are descendants of persons in those censuses, or are both California Indians and spouses of tribal members who hold valid assignments of land on the Rancheria. A person who is otherwise qualified to be a member is disqualified if he or she has been formally enrolled in another tribe, band or group, or has received an allotment of land by virtue of an affiliation with such other tribe, band or group. The Tribe's Board of Directors is responsible for maintaining a current membership roll.

Before the adoption of the Articles of Association in 1973, the Tribe was governed solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth. Marcellena Becerra, the tribal administrator, testified in the proceedings below that, when the Articles of Association were adopted, it was determined that existing members would continue to be recognized as members without the need to enroll formally. Thus,

---

[4]At the time of oral argument, Cindy's attorney represented to the court that there is a federally recognized community of Yaqui Indians located in the state of Arizona. However, Cindy does not claim membership in that community.

although his name is not on the Bureau of Indian Affairs' enrollment list for the Tribe, Richard, who was born in 1972, is recognized as a tribal member according to pre-1973 customs. He became an enrolled member of the Tribe March of 1994, after the present custody dispute began, when his mother, Karen A. ("Karen"), submitted a membership application on his behalf.

In mid-1993, Richard and Cindy discovered that Cindy was pregnant. Richard was then 21 years old, and Cindy was 20. They then lived together with their two sons, Anthony, age two, and Richard Andrew, age one, in the city of Whittier in Los Angeles County, California. However, by August of 1993, Cindy and the children were living in a shelter. Richard and Cindy realized they would not be able care for the expected twins, and so determined to relinquish them for adoption. They consulted Durand Cook, an attorney specializing in adoption, for this purpose.

Richard initially identified himself to Cook as one quarter American Indian. However, when told the adoptions would be delayed or prevented if Richard's Indian ancestry were known, Richard filled in a revised form, omitting the information that he was Indian.

During the ninth month of Cindy's pregnancy, she and Richard met with a social worker from Vista Del Mar. On November 11 and 12 respectively, after receiving counseling concerning the relinquishment and adoption process as required by regulations promulgated pursuant to Family Code section 8621 (Cal. Code Regs., tit. 22, § 35128 et seq.), Richard and Cindy signed documents relinquishing the twins to Vista Del Mar, with the intent that they would be adopted by the R's.[5] The relinquishments were filed with

---

[5] The record indicates that the R's paid approximately $14,000 to Cook for the birth mother's expenses, in addition to attorney's fees.

the state Department of Social Services on November 23, 1993.[6] Although the relinquishments were filed with relinquishment

---

[6]Since January 1, 1994, the California statutes governing agency adoptions are found in Chapter 2 (§§ 8700 et seq.) of Part 2 of Division 13, "Adoption," of the Family Code. These statutes are substantially identical to statutes in the Civil Code, now repealed, which previously governed the same subject matter. Together with related statutes and regulations, they provide in pertinent part that: (1) Either or both biological parents may relinquish a child to a licensed adoption agency or the Department of Social Services (Fam. Code, § 8700, subd. ((a)); (2) the relinquishment must he executed after the child is born and when the birth mother has been released from the hospital or declared competent by her attending physician to execute a valid relinquishment (22 Cal.Code Reg. § 35139); (3) each relinquishing parent must also sign, in the presence of an agency representative and two additional adult witnesses, a "Statement of Understanding," indicating the parent's clear understanding of the effects of the relinquishment (22 Cal.Code Reg. §§ 35149; 35151(a)(2)(a)); (4) when executed in compliance with the above requirements, a relinquishment is final upon filing with the Department, and may be rescinded thereafter only by the mutual consent of the relinquishing parent or parents and the Department or licensed adoption agency (Fam. Code, § 8700, subd. (d)); (5) the biological parents may designate the prospective adoptive family, and, if the child is not placed with that family, may rescind the relinquishment within 30 days (Fam. Code, § 8700, subds. (e), (f) and (g)); (6) the filing of the relinquishment terminates all parental rights (Fam. Code, § 8700, subd. (h)); (7) a child who is relinquished should be placed with a relative, or, if a relative is not available, with a family of the same racial or ethnic background as the child, or, if no such family is available within 90 days of the relinquishment' after a diligent search, with any suitable family (Fam. Code, § 8708; (8) the above preferences need not be applied if the birth parents request otherwise (Fam. Code, § 8709); (9) a person who has been approved

documents contained direct queries as to whether either biological parent was of Indian descent, Richard concealed his Indian ancestry and listed his "basic ethnic group," as "`white."

A few days after the relinquishments were executed, the R's returned with the twins to their home in Ohio, where they have lived as a family 'ever since. On May 4, 1994, the R's filed a petition in Franklin County, Ohio to adopt Bridget and Lucy. That petition is presumably still pending.[7]

In December of 1993, Richard told his mother, Karen, about Cindy's pregnancy, the birth of the twins and their adoption. In early February of 1994, Karen contacted attorney Cook. At approximately the same time, Karen contacted the Tribe. A representative of the Tribe contacted Cook in February or March of 1994. Cook informed the R's of this communication. On March 4, 1994, Amy Martin, the Tribe's Chairperson, wrote to the Los Angeles County Children's Court, stating that the twins were potential members of the Tribe and

---

by the Department or a licensed adoption agency to adopt a child may file a petition for adoption in the county where the petitioner resides (Fam. Code, §§ 8704, 8714); (10) if the prospective adoptive parents reside outside of California, they may file a petition for adoption in the state where they reside under the Interstate Compact on the Placement of Children (Fam. Code, § 7901).

It is undisputed that, but for the challenged application of ICWA, the biological parents' relinquishments of parental rights were valid and final under the above statutes as of November 23, 1993, the date when the relinquishments were filed with the Department of Social Services in Sacramento.

[7]The adoption of the twins in Ohio, after a relinquishment of parental rights in California, is authorized under the Interstate Compact on the Placement of Children (Fam. Code, § 7901.)

requesting intervention in any proceedings concerning them. On approximately that same date, Karen submitted tribal enrollment applications for herself, Richard, the twins, and Richard's two other children. On March 9, 1994, Amy Martin wrote to Vista Del Mar, stating that the twins were of Indian descent, and Karen, their paternal grandmother, wished them placed within the extended Indian family.

During these weeks and months, the relationship between Richard and Cindy was deteriorating. On April 27, 1994, Cindy obtained a restraining order, which required Richard to remain at least 100 yards from Cindy and their two sons, Anthony and Richard Andrew. In a declaration in support of her application for the restraining order, Cindy related that on numerous occasions during March, Richard hit and kicked Cindy and pushed her down, broke furniture, and abused the one- and two-year-old children by picking them up by the neck and shaking or dropping them, poking them in the face, or hitting them in the head. On at least one of these occasions, Richard was intoxicated.[8]

On April 22, 1994, Richard sent to Vista Del Mar a letter which stated that Richard wished to rescind his relinquishment of the twins and to have them raised within his extended family. This letter was drafted by Lorraine Laiwa, a member of the Tribe. Laiwa read the letter to Richard over the telephone. After he approved its contents, she mailed it to him for his signature. After signing the letter, Richard sent the original to Vista Del Mar and a copy to his mother. Richard later testified that his intent, when he signed the letter, was to place the twins with his sister.

---

[8] The restraining order is included in the record on appeal, although it was not admitted into evidence in the proceedings below. At the request of the R's, we have taken judicial notice of the order and supporting documents. (Evid. Code,§ 452.)

On June 20, 1994, Richard had a meeting with Elias Lefferman, Ph.D., Director of Community Services at Vista Del Mar, concerning the request to rescind his relinquishment of the twins. During this meeting, Richard acknowledged that he had previously concealed his Indian ancestry. He stated that his decision to rescind his relinquishment of parental rights was prompted by his mother, Karen, so that Richard's sister could raise the twins. Vista Del Mar denied Richard's request to withdraw the relinquishments, and the proceedings that are now before us for review followed.[9]

CONTENTIONS

On appeal and in their petition for writ of mandate, the adoptive parents contend that: (1) the trial court erred in failing to recognize the "existing Indian family" doctrine and (2) ICWA is unconstitutional, unless limited by the "existing Indian family" doctrine, in that it (a) impedes the exercise of fundamental rights of adopted children and their adoptive families; (b) creates an impermissible racial classification, and (c) exceeds the enumerated powers of Congress and violates the Tenth Amendment.

In the alternative, the adoptive parents argue that, even if ICWA is constitutional and is not limited by the "existing Indian family" doctrine, the trial court's order must be reversed, because: (1) Richard is not a presumed father, (2) the Tribe is precluded from retroactively enrolling Richard and the twins as tribal members, (3) the twins are only 3/32 Indian, (4) the biological parents, having concealed Richard's Indian heritage in order to facilitate the adoption,

---

[9]Such proceedings include: (1) a petition to declare the twins free of parental custody and control under Family Code section 7822, filed by the R's; (2) a motion to intervene, filed by the Tribe; (3) a complaint for declaratory relief, filed by Vista Del Mar; and (4) a petition to determine parental rights of alleged natural father under Family Code section 7662, filed by Vista Del Mar.

are estopped from invoking ICWA to prevent it and (5) ICWA's provisions do not defeat the requirement that a hearing must be held on the issue of whether a change of custody to the extended biological family is in the best interests of the children or will be a detriment to them.

DISCUSSION

1. *Summary of Relevant Portions of ICWA.*

ICWA, enacted by Congress to prevent the further "wholesale separation of Indian children from their families" through state court proceedings, was prompted by studies conducted in the 1970's which showed that Native American children were being removed from their homes, through both foster care and adoption, in disproportionate numbers. (*Mississippi Band of Choctaw Indians v. Holyfield, supra*, 490 U.S. at pp. 32-37.)

The Act is broken down into two titles. In this case, we are concerned only with Title I (25 U.S.C. §§ 1901 - 1923) which provides for the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the States and establishes federal standards to protect Indian families. Title II of the Act (25 U.S.C. §§ 1931 - 1963) provides for grants to Indian tribes and organizations to operate child and family service programs.

Sections 1901 and 1902 set forth the historical and policy bases of ICWA. The stated policies are to protect the best interests of Indian Children and protect the cultural heritage of Indian nations from destruction through the removal of children from Indian tribes. Section 1903 defines the Acts operative terms. An "Indian child" is defined as "any unmarried person who is under age eighteen and either (a) is a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a tribal member." (25 U.S.C. § 1903, subd. (4).) An "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of

Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians...." (25 U.S.C.A. § 1903, subd. (8).)

Section 1911, subdivision (a), gives an Indian tribe "exclusive jurisdiction as to any State over any child custody proceeding involving an Indian child who resides on or is domiciled within" the tribal reservation. When an Indian child who is not domiciled on a reservation is the subject of child custody proceedings in a state court, section 1911, subdivision (b), provides that, absent good cause, jurisdiction shall be transferred to the child's tribe upon request by either parent or the tribe. Subdivision (c) provides that an Indian child's tribe may intervene in any state court custody proceeding affecting the child. Subdivision (d) requires all jurisdictions within the United States to give full faith and credit to the acts of an Indian tribe that are applicable to Indian child custody proceedings.

Section 1912 provides standards for involuntary proceedings respecting the removal of Indian children from their homes. These include a requirement of clear and convincing evidence of a threat of serious harm before an Indian child may be placed in foster care or in the custody of a guardian (§ 1912, subd. (e)), and a requirement of proof beyond a reasonable doubt, supported by the testimony of qualified experts, of a threat of serious harm before parental rights respecting an Indian child may be terminated (§ 1913, subd. (f)).

Section 1913 sets forth standards for voluntary foster care placements and voluntary terminations of parental rights. Subsection (a) provides that Indian parents who relinquish their parental rights must execute the relinquishments in writing before a judge, who must certify that the proceedings were explained to the parents in a language they understand. Subsection (a) further provides that "Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid." Subsection (b) provides that a parent or Indian custodian may withdraw consent to a foster care placement at any time, and upon such withdrawal, the child must be returned.

Subsection (c) provides that a parent or Indian custodian may withdraw consent to termination of parental rights at any time until entry of a final order of adoption or termination, and upon such withdrawal, the child must be returned. Subsection (d) provides that a final court decree of adoption may be overturned at any time within two years of its entry if parental consent was obtained through fraud or duress.

Section 1914 of ICWA allows any Indian child, parent or Indian custodian from whom a child was removed, and the Indian child's tribe to petition a court of competent jurisdiction to invalidate a foster care placement or termination of parental rights upon a showing that such action violated any provision of sections 1911, 1912 or 1913.

2. *The "Existing Indian Family " Doctrine*

As noted above, ICWA applies to any child who is either: (1) a member of an Indian tribe, or (2) eligible to be a member, and the biological child of a member of a tribe. (§ 1903, subd. (4).) However, some courts have declined to apply the Act where a child is not being removed from an existing Indian family, because, in such circumstances, ICWA's underlying policies of preserving Indian" culture and promoting the stability and security of Indian tribes and families are not hindered. (*In re Adoption of Crews, supra*, 825 P.2d 305; *Matter of Adoption of Baby Boy L., supra*, 643 P.2d 168.)

The earliest case to articulate what later became known as the existing Indian family doctrine was *Matter of Adoption of Baby Boy L., supra*, 643 P.2d 168. In the case, the Kansas Supreme Court observed that the purpose of ICWA was to maintain family and tribal relationships existing in Indian homes and to set standards for removal of Indian children from an existing Indian environment. (643 P.2d at p. 175.) The court found that the child whose custody was at issue in that case had been relinquished by his non-Indian mother at birth and had never been in the custody of his Indian father. The child thus had

never been part of an Indian family relationship. Preservation of an Indian family was therefore not involved in the case; consequently, ICWA did not apply. (643 P.2d at p. 175; see also *Matter of Adoption of T.R.M.* (Ind., 1988) 525 N.E.2d 298, 303; *Claymore v. Serr* (S.D., 1987) 405 N.W.2d 650, 654; *In the Interest of S.A.M.* (Mo., 1986) 703 S.W.2d 603, 609; *Adoption of Baby Boy D.* (Ok., 1985) 742 P.2d 1059, 1064, cert. den. by *Harjo v. Duello* (1988) 484 U.S. 1072 [98 L.Ed.2d 1005, 108 S.Ct. 1042].)

While the above cases found ICWA inapplicable because the Indian child himself (or herself) had never lived in an Indian environment, other cases have focused upon the question of whether the child's natural family was part of an Indian tribe or community or maintained a significant relationship with one. In *Matter of Adoption of Crews, supra*, 825 P.2d 305, a case involving facts very similar to those before us, the Supreme Court of Washington found ICWA inapplicable to an adoption proceeding where the biological parents had no substantial ties to a specific tribe, and neither the parents nor their families had resided or planned to reside within a tribal reservation, although the birth mother was formally enrolled as a tribal member. In such a situation, the court found the application of ICWA would not further the Act's policies and purposes and would consequently not be proper. (825 P.2d at pp. 308-310, see also, *Hampton v. J.A.L.* (La.App., 2 Cir., 1995) 658 So.2d 331, 336, aff'd. by Supreme Court of Louisiana at 662 So.2d 478.)

In California, at least two courts have recognized the existing family doctrine. In *In re Wanomi P.* (1989) 216 Cal.App.3d 156, the court found ICWA inapplicable by its express terms, because the tribe to which the child's mother belonged was a Canadian tribe, not a federally recognized tribe, as required by section 1903, subdivision (8) of ICWA. (216 Cal.App.3d at p. 166.) However, the court also observed, in dictum that regulating the unwarranted removal of children from Indian families by nontribal agencies was among the objectives of ICWA, and no evidence suggested the existence of an Indian family from which the minor was being removed. (Id. at p.

168.) Thus, the court noted that there would be no occasion for an application of ICWA. (*Ibid.*) In *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, the majority found the baby's tribe had a right to intervene in adoption proceedings. However, the right of intervention existed under state law, independently of ICWA. (230 Cal.App.3d at pp. 1618-1619.) The court found that, upon remand of the action, the preferences for the placement of Indian children in Indian families or settings, which are provided in section 1915 of ICWA, need not be followed if the trial court found the child had no actual Indian family ties. (230 Cal.App.3d at pp. 1620-1621.)

Two other California courts, however, have refused to apply the existing Indian family doctrine, or at least that version of the doctrine which holds that ICWA applies only if the *child himself (or herself)* has lived in an Indian family or community. In *Adoption of Lindsay C., supra*, 229 Cal.App.3d 404, the court characterized the doctrine as follows: "Generally speaking, [the doctrine] hold[s] the Act inapplicable in adoption proceedings involving an illegitimate Indian child who has never been a member of an Indian home or Indian culture, and who is being given up by his or her non-Indian mother." (229 Cal.App.3d at p. 410.) The *Lindsay C.* court rejected the doctrine as so characterized (*Id.* at pp. 415-416.) The trial court had found the tribe of the child's unwed father had no right to notice of a pending step-parent adoption affecting the child, because he was the illegitimate child of a non-Indian mother, had always resided with the non-Indian mother, and had never been in the care or custody of the natural father, nor had any connection with Indian culture. Thus, without ever considering whether the natural father had significant ties with an Indian community, which he might one day share with the child if their family ties were not severed, the trial court concluded that no issue of the preservation of an Indian family was involved, as the child had never been a part of an Indian family. (*Id.* at p. 415.) The Court of Appeal rejected this reasoning and reversed. (*Id.* at pp 415-416.)

Likewise in *In re Junious M.* (1983) 144 Cal.App 3d 786, in a proceeding under (former) Civil Code section 232, the child's mother informed the court on the third day of trial that she was of Indian descent. (144 Cal.App.3d at pp. 788-789.) The court found the mother's tribe had a right to notice of the proceedings and a right to intervene, even though the minor had never lived in an Indian environment. "The language of the Act contains no [existing Indian family] exception to its applicability, and we do not deem it appropriate to create one judicially." (*Id.* at p. 796, citing *A.B.M. v. M.H.* (Alaska 1982) 651 P.2d 1170,1173.)"[10]

We agree that a rule which would preclude the application of ICWA to any Indian child who has not *himself (or herself)* lived in an Indian family does not comport with either the language or purpose of the Act. Moreover, the United States Supreme Court has implicitly rejected any such limitation on ICWA. In *Mississippi Band of Choctaw Indians v. Holyfield, supra*, 490 U.S. 30, the only case in which the federal high court has construed ICWA, application of the Act's tribal jurisdiction provisions (25 U.S.C.A. § 191 1, subd. (a)) was challenged by the adoptive parents of illegitimate twin babies

---

[10]The biological parents argue that an additional California case, *In re Crystal K* (1990) 226 Cal.App.3d 655, also declines to apply the existing Indian family doctrine, but that characterization is not entirely accurate. In *Crystal K*, the court rejected the mother's contention that her action to terminate the parental rights of her former husband fell under the exception provided under the express terms of ICWA for custody proceedings that are part of a state proceeding for the dissolution of a marriage. (226 Cal.App.3d at p. 663-664.) The closest *Crystal K* came to rejecting the existing Indian family doctrine was to say that "To the extent *Wanomi P.* narrowly construes "Indian home" and "removal," we disagree with that court on the facts before us...." (Id at p. 665.) *Crystal K.* found that ICWA applied "even [under] *Baby Boy L.'s* [643 P.2d 168] characterization of the Act's purposes...." (*Ibid.*)

whose parents were enrolled members of an Indian tribe and were residents of the tribal reservation. (490 U.S. at pp. 37-38.) The babies were born off of the reservation and immediately relinquished to a non-Indian family, who adopted them in the state Chancery court. The birth mother returned home to the reservation after giving birth. On a subsequent motion by the tribe to vacate the adoption on the ground that the tribal court had exclusive jurisdiction over matters affecting the children's custody, the state court found the children had never resided, or even been physically present, on the reservation, and were thus not domiciled there. Consequently, the court found ICWA did not apply. (*Ibid.*) The Supreme Court reversed (*Id.* at p. 41), finding that (1) a general federal rule of domicile must apply for purposes of determining jurisdiction under ICWA (*Id.* at pp. 43-45); (2) under such rule, the children's domicile at birth followed that of their natural mother, and she was domiciled on the reservation (Id. at pp. 47-49); (3) therefore, the tribe had exclusive jurisdiction over custody proceedings affecting the children under section 1911, subdivision (a). (*Id.* at p. 53.)

Holyfield establishes, by clear implication, that an application of ICWA will not be defeated by the mere fact that an Indian child has not himself (or herself) been part of an Indian family or community. However, it does not follow from *Holyfield* that ICWA should apply when neither the child nor either natural parent has ever resided or been domiciled on a reservation or maintained any significant social, cultural or political relationship with an Indian tribe.[11] To the contrary, in our view, there are significant constitutional impediments to

---

[11]We note in passing that Congress in 1987 failed to approve amendments to ICWA which were described in materials considered by the Senate Select Committee on Indian Affairs as having the effect of precluding application of the existing Indian family doctrine. (See Hearings before the Senate Select Com. on Indian Affairs, United States Senate, 100th Cong., 1st Sess. on Oversight Hearings on the Indian Child Welfare Act, Nov. 10, 1987, Appendix 8, pp 167-171).

applying ICWA, rather than state law, in proceedings affecting the family relationships of persons who are not residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects except genetic heritage, are indistinguishable from other residents of the state. These impediments arise from the due process and equal protection guarantees of the Fifth and Fourteenth Amendments and from the Tenth Amendment's reservation to the states of all powers not delegated to the federal government. We must, of course, construe the statute to uphold its constitutionality. (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council* (1983) 485 U.S 565, 575 [99 L.Ed.2d 645, 108 S.Ct. 1392], *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826.)

3. *Constitutional Limitations Upon the Scope of ICWA*

a. *Due Process*

The intent of Congress in enacting ICWA was to "protect the best interests of Indian children," as well as "promote the stability and security of Indian tribes and families." (25 U.S C. § 1902.) These two elements of ICWA's underlying policy are in harmony in the circumstance in which ICWA was primarily intended to apply--where nontribal public and private agencies act to remove Indian children from their homes and place them in non-Indian homes or institutions. (See 25 U.S.C. § 1901, subd, (4).) But in cases such as this one, where, owing to noncompliance with ICWA's procedural requirements, ICWA's remedial provisions are invoked to remove children from adoptive families to whom the children *were voluntarily given by the biological parents*, the harmony is bound to be strained. Indeed, in circumstances of this kind, the interests of the tribe and the biological family may be in direct conflict with the children's strong needs, which we find to be constitutionally protected, to remain through their developing years in one stable and loving home.

An individual's many related interests in matters of family life are compelling and are ranked among the most basic of civil rights. (*Quilloin v. Walcott* (1978) 434 U.S. 246, 255 [54 L.Ed.2d 511, 98 S.Ct. 549]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The United States Supreme Court has stated that "[t]he intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." (*Lehr v. Robertson* (1983) 463 U.S. 248, 256 [77 L.Ed.2d 614, 103 S.Ct. 985].) The high court has explained that its decisions which accord federal constitutional protection to certain parental rights rest upon "the historic respect--indeed, sanctity would not be too strong a term--traditionally accorded to the relationships that develop within the unitary family." (*Michael H. v. Gerald D.* (1989) 491 U.S. 110, 123 [105 L.Ed.2d 91, 109 S.Ct. 2333].)

Family rights are afforded not only procedural but also substantive protection under the due process clause. (*Meyer v. Nebraska*, 262 U.S. 390, 399-401 [67 L.Ed.1042, 43 S.Ct. 625] [law against teaching foreign languages in elementary schools did not serve sufficiently compelling public purpose to justify infringement of due process rights of students to acquire knowledge and of parents to control their children's education]; *Stanley v. Illinois* (1972) 405 U.S. 645, 649 [31 L.Ed.2d 561, 92 S.Ct. 1208] ["[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him...."]; *Santosky v. Kramer* (1982) 455 U.S. 745, 753 [71 L.Ed.2d 599, 102 S.Ct. 1388] ["When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."]; *Moore v. East Cleveland* (1977) 431 U.S. 494, 502 [52 L.Ed.2d 531, 97 S.Ct. 1932] [local ordinance which limited occupancy of a dwelling unit to members of a nuclear family violated Due Process Clause].) Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. (*Moore v. East Cleveland, supra*, 431 U.S. at

pp. 501-502; *In re David B.* (1979) 91 Cal.App.3d 184,192-193.) Legislation which interferes with the enjoyment of a fundamental right is unreasonable under the Due Process Clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of the purpose. In other words, such legislation would be subject to a strict scrutiny standard of review. (*Moore v. East Cleveland, supra*, 431 U.S. at p. 499; *Bates v. City of Little Rock* (1960) 361 U.S. 516, 524 [4 L.Ed.2d 480, 80 S.Ct. 412]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 83 S.Ct. 1790]; see also *Poe v. Ullman* (1961) 367 U.S. 497, 547 [6 L.Ed.2d 989, 81 S.Ct. 17521, dis. opn of Harlan, J.)

When discussing constitutional protections of family relationships, the courts have focused more often upon the rights of parents than those of children. The United States Supreme Court has declared that the interests "of a man in the children he has sired and raised . . .undeniably warrants deference" (*Stanley v. Illinois. supra*, 405 U.S. at p. 651; italics added) and that *parents'* interest in the "care, companionship, custody and management" of their children has "'a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' [Citation.]" (*Ibid.*, italics added, see also *Santosky v. Kramer, supra*, 455 U.S. at p. 753; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27 [68 L.Ed.2d 640, 101 S.Ct. 21531.) The California Supreme Court has likewise declared a parent's interest in the care, custody and management of his or her children to be "a compelling one, ranked among the most basic of civil rights." (*In re Marilyn H, supra*, 5 Cal.4th at p. 306; see also *Adoption of Kelsey S., supra*, 1 Cal.4th at pp. 830-848; *In re Angelia P.* (1981) 28 Cal.3d 908, 916.)

However, the courts have described the constitutional principles which govern familial rights in language which strongly suggests the Constitution protects the familial interests of children just as it protects those of parents. The federal high Court has said that "the relationship *between parent and child* is constitutionally protected" (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255; italics

added) and also has "emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." (*Lehr v. Robertson, supra*, 463 U.S. at p. 257.) Our own Supreme Court has stated that the right of parents to the care, custody and management of their children, although fundamental, is not absolute, and has stated that "[c]hildren, too, have fundamental rights--including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.' " (*In re Jasmon O., supra*, 8 Cal.4th 398, 419, quoting *In re Marilyn H., supra*, 5 Cal.4th at p. 306.) "Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." *(In re Jasmon O., supra*, 8 Cal.4th at p. 419; italics added.)

Moreover, as a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships compose more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring. (See generally, *In re Jasmon 0., supra*, 8 Cal.4th at p. 419.)

Cases which hold that deference is to be accorded to parental rights do so in part on the assumption that children's needs generally are best met by helping parents achieve their interests. (*Santosky v. Kramer, supra*, 455 U.S. at pp. 759-761; *Stanley v. Illinois, supra*, 405 U.S. at p. 649; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-254; *In re Angelia P., supra*, 28 Cal.3d at pp. 916-917.) In some situations, however, children's and parents' rights conflict, and in these situations, the legal system traditionally protects the child. (*Cynthia*

D v. Superior Court, supra, 5 Cal.4th at p. 254; *In re Angelia P., supra*, 28 Cal.3d at p 917.)

Circumstances in which a parent's and child's interest diverge, and the child's interests are found more compelling, include circumstances where a child has been in out-of-home placement under the jurisdiction of a dependency court for 18 months, and the parent has failed to correct the problems which caused the child to be removed from the home (*In re Jasmon O., supra*, 8 Cal.4th at pp. 419-422; *Cynthia D. v. Superior Court, supra*, 5 Cal.4th at pp. 254-256.) In cases of this kind, the California Supreme court has ruled that a substantial likelihood that the child will suffer serious trauma if separated from the foster family can establish sufficient detriment to overcome the parents' right to the care, custody and companionship of the child. (*In re Jasmon O., supra*, 8 Cal.4th at pp. 418-419.) A child's right to remain in a stable home is also found both to be adverse to and to outweigh a parent's interests where a natural father failed to show a commitment to the child within a reasonable time of learning of the mother's pregnancy, but later seeks to assert parental rights and disturb an adoptive placement or step parent family in which the child is secure and thriving. *(Lehr v. Robertson, supra*, 463 U.S. pp. 261-262, *Quilloin v. Walcott, supra*, 434 U.S. at p. 255; *Adoption of Michael H.J supra*, 10 Cal.4th at pp. 1054-1058.) In such cases, the United States Supreme Court has ruled that the parental rights of the natural father are superseded by policies favoring preservation of the child's existing family unit. (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255.)

Both the California Supreme Court and the United States Supreme Court have also recognized that a person's interests and rights respecting family relationships do not necessarily depend upon the existence of a biological relationship. (*Lehr v. Robertson, supra*, 463 U.S. at p. 2613; *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1057-1058.) The United States Supreme Court has stated that "[n]o one would seriously dispute" that familial interests and rights may attach to the emotional ties which grow between members of a de

facto family. (*Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 844 [53 L.Ed.2d 14, 97 S.Ct. 2094].) Both high courts have recognized that such interests and rights may outweigh biological relationships under some circumstances. (*Lehr v. Robertson, supra*, 463 U.S. at p. 261, (*Quoilloin v. Walcott, supra*, 434 U.S. at p. 255; *Smith v. Organization of Foster Families, supra*, 431 U.S. at pp. 843-844; *Adoption of Michael H., supra*, 10 Cal.4th at pp. 1057-1058.)[12]

Here, the biological parents have come before the court after having voluntarily relinquished their twin girls for adoption. The biological parents claim they are entitled to reestablish their relationship with the children, because their relinquishments of parental rights were not executed in accordance with ICWA. However, any claim which they may have under the statute does not necessarily establish a claim to that deference which parental rights are generally accorded under the Constitution. A biological parent's constitutional rights, like other constitutional rights, may be waived, provided only that the waiver is knowingly and intelligently made

---

[12]In *Smith v. Organization of Foster Families, supra*, 431 U.S. 816, the Supreme Court declined to find that the plaintiff foster parents had constitutionally protected interests in their relationships with the foster children. (431 U S. at p. 847.) One determinative factor which prevented such a finding was the fact that a foster parent" foster child relationship is the product of a "knowingly assumed" contractual relationship between the state and the foster parent, in which the foster parent agrees to the essentially temporary nature of the arrangement. (*Id.* at pp. 845-846.) However, the high court acknowledged that similar relationships may carry Constitutional protections in appropriate circumstances. (*Id.* at p. 844), and the court later cited language from *Smith* in the course of ruling that a natural parent's rights do not always take precedence over those of the children and their de facto families. (*Lehr v. Robertson, supra*, 463 U.S. at p. 261.)

(*D.H. Overmyer Co., Inc. v. Frick Co.* (1972) 405 U.S. 174, 185-186 [31 L.Ed.2d 124, 92 S.Ct. 775]; *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 545), and the counseling which is required by California law before a parent may relinquish a child for adoption has been held to be sufficient to assure that any waiver of parental rights is knowing and intelligent. *(Tyler v. Children 's Home Society, supra*, 29 Cal.App.3d at pp. 546-547.)

Given the failure to comply with procedural requirements of ICWA, we cannot conclude that there has been a waiver of parental rights in this case. However, as we have observed, prior judicial decisions establish that, where a child has formed familial bonds with a de facto family with whom the child was placed owing to a biological parents' unfitness (*In re Jasmon 0., supra*, 8 Cal.4th at p. 418) or initial failure to establish a parent-child relationship *(Lehr v. Roberston, supra*, 463 U.S. at p. 261; *Adoption of Michael H., supra*, 10 Cal.4th at p. 1057), and where it is shown that the child would be harmed by any severance of those bonds, the child's constitutionally protected interests outweigh those of the biological parents. (*Lehr v. Robertson, supra*, 463 U.S. at pp. 261-262; *Adoption of Michael H., supra*, 10 Cal.4th at pp. 1057-1058; *In re Jasmon 0., supra*, 8 Cal.4th at pp. 418-419.) The rule can logically be no different where children have become bonded to a family in which they were placed after a knowing, intelligent and express relinquishment of parental rights. Inasmuch as children have a liberty interest in the continuity and stability of their homes (*In re Jasmon 0., supra*, 8 Cal.4th at p. 419; *In re Marilyn H., supra*, 5 Cal.4th at p. 306), where a child's biological parents knowingly and intelligently relinquish the child to others for the express purpose of giving the child a loving and stable home, the biological parents' voluntary act constitutes at the very least a voluntary *subordination* of their constitutional rights to those of the children. The biological parents thus must rely solely upon ICWA for any claim which they might have in this matter.

The interests of the Tribe in this dispute are likewise based solely upon ICWA. There neither is nor can be any claim that the

Tribe's interests are constitutionally protected. The R's, as the prospective adoptive parents, similarly have no interests which have been found to enjoy constitutional protection. *(Smith v. Organization of Foster Families, supra*, 431 U.S. at pp, 838-847.)

However, the twins do have a *presently existing* fundamental and *constitutionally protected* interest in their relationship with the only family they have ever known. The children are thus the only parties before the court which have such interests. Therefore, if application of ICWA would interfere with those interests, such application must be subjected to a strict scrutiny standard to determine whether it serves a compelling government purpose and whether it is actually necessary and effective to the accomplishment of that purpose. If not, then ICWA, as so applied, would deprive the children of due process of law. (*Moore v. East Cleveland, supra*, 431 U.S. at p. 499; *Bates v. City of Little Rock, supra*, 361 U.S. at p. 524; *Sherbert v. Verner, supra*, 374 U.S. at p.406.)

The questions which we therefore must determine are (1) whether the tribal interests which ICWA protects are sufficiently compelling under substantive due process standards to justify the impact which ICWA's requirements will have on the twins' constitutionally protected familial rights, and, if so, (2) whether application of ICWA, under facts of the kind presented in this case, is necessary to further that interest.

We have no quarrel with the proposition that preserving American Indian culture is a legitimate, even compelling, governmental interest. At the same time, however, we agree with those courts which have held that this purpose will not be served by applying the provisions of ICWA which are at issue in this case to children whose biological parents do not have a significant social, cultural or political relationship with an Indian community. It is almost too obvious to require articulation, that "the unique values of Indian culture" (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture.

This being so, it is questionable whether a rational basis, far less a compelling need, exists for applying the requirements of the Act where fully assimilated Indian parents seek to voluntarily relinquish children for adoption. The case for applying ICWA is even weaker where assimilated parents have previously concluded a reasoned and voluntary relinquishment of a child, which was valid and has become final under state law, and the child has become part of an adoptive or prospective adoptive family. In this circumstance, the invalidation of the relinquishment manifestly can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he or she is loved and well cared-for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow. ICWA cannot constitutionally be applied under such facts.

b. *Equal Protection.*

ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation. As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers. To the extent this disparate and sometimes disadvantageous treatment is based upon social, cultural or political relationships between Indian children and their tribes, it does not violate the equal protection requirements of the Fifth and Fourteenth Amendments. (*United States v. Antelope* (1977) 430 U S. 641, 646 [51 L.Ed.2d 701, 97 S.Ct. 1395]; *Moe v. Salish Kootenai Tribes* (1976) 425 U.S. 463, 480-481 [48 L.Ed.2d 96, 96 S.Ct. 1634]; *Morton v. Mancari* (1974) 417 U.S. 535, 554 [41 L.Ed.2d 290, 94 S.Ct. 2474].) However, where such social, cultural or political relationships do not exist or are very attenuated, the only remaining basis for applying ICWA rather than state law in proceedings affecting an Indian child's custody is the child's genetic heritage--in other

words, race.

Equal protection principles regard racial classifications of all kinds as "inherently suspect" *(Regents of the Univ. of California v. Bakke* (1978) 438 U.S. 265, 289-290 [57 L.Ed.2d 750, 98 S.Ct. 2733] (lead opn. of Powell, J.)), indeed, "odious to a free people." (*Hirabayashi v. United States* (1943) 320 U.S. 81, 100 [87 L.Ed. 1774, 63 S.Ct. 1375].) The United States Supreme Court has recently held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *(Adarand Constructors, Inc. v. Pena* (1995) _U.S._ [132 L.Ed.2d 158, 182, 115 S.Ct. 2097] (hereafter "Adarand"; lead opn. of O'Connor, J.); see also *Miller v. Johnson* (1995) _U.S. _ [132 L.Ed.2d 762, 115 S.Ct. 2475, 2482]) The same principle applies whether the group targeted by a racial classification is burdened or benefited by the classification. (*Adarand, supra*, 132 L.Ed.2d at p. 179.) The foregoing principles apply to federal legislation affecting Indian affairs *(Delaware Tribal Business Commission v. Weeks* (1974) 430 U.S. 73, 84 [51 L.Ed.2d 173, 97 S.Ct. 911].)

The Tribe and the biological parents argue that ICWA does not create a race-based classification, because application of ICWA is triggered by the child's *membership* in a tribe or eligibility for membership, and depends upon the child's genetic heritage only if the child is merely eligible for tribal membership, in which case the child must be the biological child of a tribal member. This argument is superficially appealing. However, the Tribe and the parents also argue that, under ICWA Guidelines, tribal determinations of their own membership should generally be deemed conclusive. If tribal determinations are indeed conclusive for purposes of applying ICWA, and if, as appears to be the case here, a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe

may be claimed by the Tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. Only children who are racially Indians face this possibility.[13]

For purposes of determining whether a particular application of ICWA creates a racially based classification, it makes no difference that not all tribes recognize as tribal members all blood descendants of tribal members. (See, e.g, *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 52-53 [56 L.Ed.2d 106, 98 S.Ct. 1670][tribe denied tribal membership to the children of female tribal members who married outside the tribe, but not to the children of similarly situated male tribal members].) As we have observed above, to the extent that tribal membership within the meaning of ICWA is based upon social, cultural or political tribal affiliations, it meets the requirements of equal protection. However, any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause. So scrutinized, and for the same reasons set forth in our discussion of the due process issue, it is clear that ICWA's purpose is not served by an application of the Act to children who are of Indian descent, but whose parents have no significant relationship

---

[13]There may, of course, be instances in which an Indian tribe admits a non-Indian as a tribal member, and, in such cases, that member's biological children may fall within ICWA's definition of Indian children even if they have no Indian blood. However, grant of tribal membership to a non-Indian would plainly be based upon some social, cultural or political bond which the non-Indian established with the tribe. The decision we must make is whether ICWA is constitutionally over broad if applied to racially Indian children whose families have social, cultural or political relationship with a tribal community.

with an Indian community. If ICWA is applied to such children, such application deprives them of equal protection of the law.

c. *The Indian Commerce Clause And The Tenth Amendment.*

Congress's authority to enact ICWA arises from clause 3 of section 8 of article I of the Constitution, "The Congress shall have power . . . to regulate Commerce . . . with the Indian tribes." (25 U.S.C.A. § 1901, subd. (1), *In re Wanomi P., supra*, 216 Cal.App 3d at pp. 162-163.) This clause grants Congress plenary power over Indian affairs. (*United States v. Wheeler* (1978) 435 U.S. 313, 318 [55 L.Ed.2d 303, 98 S.Ct. 1079]; *Morton v. Mancari, supra*, 417 U.S. at pp. 551-552; *Worcester v. State of Georgia* (1831) 31 U.S. (6 Pet.) 515, 559 [8 L.Ed. 483].) Indian tribes are deemed to be semi-sovereign nations under the protection of the federal government. Tribes retain attributes of sovereignty over both their members and their territories; such sovereignty is dependent on, and subordinate to, only the Federal Government, not the states. (*California v. Cabazon Band of Indians* (1987) 480 U.S. 202, 207 [94 L.Ed.2d 244, 107 S.Ct. 1083]; *Washington v. Confederated Tribes* (1980) 447 U.S. 1349 153-154 [65 L.Ed.2d 10, 100 S.Ct. 2069].)

The principles of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seek an accommodation between the interests of the tribes and the federal government on the one hand, and those of the states, on the other. (*Washington v. Confederated Tribes, supra*, 447 U.S. at pp. 156-157.) Thus, the Supreme Court has held nonreservation Indians are generally subject to nondiscriminatory and generally applicable state laws [a]bsent express federal law to the contrary." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149 [36 L.Ed.2d 114, 93 S.Ct. 1267].) Even on Indian reservations, state laws generally may be applied insofar as they do not interfere with reservation self-government or essential internal tribal affairs, or impair a right reserved by federal law. (*Id.* at p. 148.)

Jurisdiction over matters of family relations is traditionally reserved to the states. (*Rose v. Rose* (1987) 481 U.S. 619, 625 [95 L.Ed.2d 599, 107 S.Ct. 2029]; *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 511-512 [73 L.Ed.2d 928, 102 S,Ct. 3231]; *In re Burris* (1890) 136 U.S. 586, 593-594 [34 L.Ed. 500, 10 S.Ct. 850].) Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do "major damage" to "clear and substantial federal interests." [Citations]." *(Rose v. Rose, supra*, 481 U.S. at p. 625.)

Under these principles, ICWA should apply rather than state laws respecting family relations only where such application actually serves the specific purposes for which ICWA was enacted, "to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902), or the broader purposes which are served by all authorized exercises of Congressional power under the Indian Commerce Clause, namely, the purposes of acting as a guardian to the Indian tribes, and in so doing, protecting Indian tribal self-government. (*Morton v. Mancari, supra*, 417 U.S. at pp. 553-554.)

The recent case of United States v. Lopez _U.S._ [131 L.Ed.2d 626, 115 S.Ct. 1624) is instructive, although that case concerned the powers of Congress under the Interstate Commerce Clause, and the reach of the Indian Commerce Clause is not identical. In *Lopez*, the United States Supreme Court indicated that Congress's power under the Interstate Commerce Clause to legislate in areas otherwise reserved to the states will be confined to matters which substantially affect interstate commerce. (115 S.Ct. at p. 1630.) The reasoning of *Lopez* logically applies with respect to the Indian Commerce Clause, indeed, to any enumerated power of Congress. Congress exceeds its authority when, acting under any of its enumerated powers, Congress legislates in matters generally within the jurisdiction of the states, in the absence of an adequate nexus to

the enumerated power under which the legislation is enacted. (Cf. 115 S.Ct. at pp. 1631-1634.)

No such nexus exists respecting application of ICWA to children whose families do not maintain significant relationships with an Indian tribe or community or with Indian culture. Once again, ICWA's purpose simply is not furthered by an application of the Act to families who are of Indian descent, but who maintain no significant social, cultural or political relationships with Indian community life, and are in all respects indistinguishable from other residents of the state. Thus, if ICWA is applied to such children, that application impermissibly intrudes upon a power reserved to the states.

d. *Conclusion.*

We do not believe ICWA applies only to Indian children who are domiciled on reservations. Indeed, the Act's express terms provide for application of most of its provisions to reservation-domiciled and nonreservation-domiciled Indians alike. (§ 1911, subds. (b) and (c).) Only the provision for exclusive jurisdiction in the tribal court is restricted to reservation domicilaries. (§ 1911, subd. (a).) However, if the Act applies to children whose families have no significant relationship with Indian tribal culture, such application runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the states, (2) it improperly interferes with Indian children's fundamental due process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children and exposes them, like the twin girls in this case, to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under ICWA (which rights were, in this case, specifically and intentionally ignored by the biological parents now asserting them). All of this occurs in the absence of even a rational relationship to a permissible state purpose, much less a necessary connection with a compelling state purpose.

We conclude that principles of substantive due process, equal protection and federalism all carry the same implication regarding the proper scope of ICWA--it can properly apply only where it is necessary and actually effective to accomplish its stated, and plainly compelling, purpose of preserving Indian culture through the preservation of Indian families. We agree with those courts which have held that ICWA's purpose is not served by an application of the Act where the child may be of Indian descent, but where neither the child nor either parent maintains any significant social, cultural or political relationships with Indian life.

4. *The Trial Court Must Determine The Question Of Whether There Was An "Existing Indian Family" Which Is The Factual Predicate To The Application Of ICWA.*

The trial court in this case determined, as a matter of law, that the twins are Indian children, because they are enrolled members of the Tribe, are recognized by the Tribe as members and are the biological children of an enrolled and recognized tribal member. The trial court thus concluded that ICWA applies, and the biological parent's relinquishment of the twins for adoption was invalid under section 1913 of the Act. However, more is required to justify an application of ICWA than a biological parents' mere formal enrollment in a tribe, or a self-serving after-the-fact tribal recognition of such a parent's membership. Such token attestations of cultural identity fall short of establishing the existence of those *significant* cultural traditions and affiliations which ICWA exists to preserve, and which are consequently necessary to invoke a constitutionally permissible application of the Act.[14]

---

[14]This conclusion is consistent with the ICWA regulations and case authority. The "Guidelines for State Courts; Indian Child Custody Proceedings" ("ICWA Guidelines,") 44 Federal Register, pages 67584 through 67595 (November 26, 1979) suggest that tribal determinations of their own membership are ordinarily deemed conclusive. However,

Because the trial court was persuaded that enrollment in the Tribe and tribal recognition of the twins' tribal membership were enough to trigger the application ICWA, the court had no occasion to make a further factual determination as to whether the biological parents maintain significant social, cultural or political relationships with the Tribe. The case must therefore be remanded so that such factual determination can be made.

---

tribal rights under the Guidelines also depend upon the existence of an actual political relationship with the tribe. (44 Federal Register at p. 67587.) Federal cases which generally consider the special rights which arise from a person's status as an Indian have held that enrollment in, or recognition by, a tribe is not the sole factor in determining Indian status. (See, e.g., *Morton v. Ruiz* (1974) 415 U.S. 199, 295 [39 L.Ed.2d 270, 945.Ct. 1055] [evidence of close economic and social ties to tribe required invalidation of Bureau of Indian Affairs rule which denied federal benefits to Indian family who lived off of the tribal reservation]; *United States v. Broncheau* (9th Cir. 1979) 597 F.2d 1260, 1263, cert. denied by *Broncheau v. U.S.* (1979) [62 L.Ed. 80, 100 S.Ct. 123] [enrollment is the common evidentiary means of establishing Indian status for purposes of the Major Crimes Act, but is not the only means and is not necessarily determinative]; *Ex party Pero* (7th Cir. 1938.) 99 F.2d 28, 29-31, cert. denied by *Lee v. Pero* (1939) 306 U.S. 643 [83 L.Ed. 1043, 59 S.Ct. 581][defendant was *not* an enrolled member of his tribe, but he was nevertheless an "Indian" for purposes of conferring federal criminal jurisdiction where he lived on the tribal reservation, maintained tribal relations and was recognized as an Indian by the tribe].) Daniel Cohen's authoritative *Federal Handbook of Indian Law* (Univ. of New Mexico Press, 1971) ("*Federal Handbook*") also expresses the view that tribal of membership is best treated "as a relative affair, existing in some cases for certain purposes and not for others." (Cohen, *Federal Handbook* at p. 136.)

The biological parents (and the Tribe), of course, will bear the burden of proof on this issue. It is they who seek to set aside the relinquishment of parental rights which were otherwise final and binding under California law. To do this they rely on the application of a federal statute. It is they who must prove that the necessary factual basis for the application of that statute is present. (Evid. Code, § 500.)

Moreover, that determination must focus upon the biological parents' social, cultural and political relationship within the Tribe, although any relationship between the Tribe and extended family members may well bear on the issue of the biological parents' relationship. On this point, we agree, with the Supreme Court of South Dakota, writing in *Claymore v. Serr, supra.* 405 N.W.2d 650, one of the early cases to apply the existing Indian family doctrine. The *Claymore* court observed that ICWA refers in some contexts to "Indian families" and in others, to "extended Indian families," suggesting that when the former term is used, the nuclear family, "the fundamental social unit in civilized society," is intended. (405 N.W.2d at pp. 653-654.)

The biological parents and the Tribe contend it would be unfair to focus only upon the nuclear family when assessing an application of ICWA, because such focus would ignore tribal kinship systems, in which the extended family is a fundamental unit. The parents and Tribe argue that one of the primary reasons ICWA was enacted was to combat the adverse effects upon Indian communities of failures by state courts and agencies to appreciate the importance in tribal life of the extended family, as well as other customs and institutions affecting the welfare of Indian children. They thus argue, in effect, that to exclude the extended family from consideration when we determine whether there is an existing Indian family, and hence, whether ICWA applies, would be a mere analytical sleight of hand, by which ICWA's requirements of giving due consideration to essential tribal relations would be unfairly sidestepped.

After giving this argument long and careful consideration, we are compelled to disagree. First, it implicitly assumes the conclusion that the biological parents did have significant social, cultural or political connections to the Tribe. If they had no such connections, then there would be no real issue of an "extended Indian family" for the court to ignore. Secondly, and more significantly, it must not be forgotten that this case has arisen because the biological parents *abjured* their Indian heritage when, instead of turning to their extended family for succour and support in anticipation of the twins' birth, they voluntarily, and for rational and understandable reasons, relinquished those children to strangers. Then, to prevent interference with those relinquishments by the Tribe, they *denied* their heritage in response to multiple direct inquiries. Having done these things, the biological parents may now justly be required to prove that they themselves have a significant relationship with an Indian community and may be precluded from using cultural ties which may be maintained by their blood relatives to bootstrap themselves into an application of ICWA.

The determination whether the twins were removed from a existing Indian family must also be made as *of the time of the relinquishments*. There can be no justification or excuse for tearing children from a family to which they are bonded, based upon an ex post facto manufacture of a legal basis for applying ICWA. The R's urge us to hold that contemporaneous enrollment in the tribal register is necessary to establish that a child's biological parent is a member of an Indian tribe within the meaning of ICWA. While such a bright-line rule has much to recommend it, we can imagine circumstances in which it would work an injustice, and we decline to "pounce such a rule. Nevertheless, the circumstance that Richard's mother Karen--not Richard himself--applied for tribal enrollment for herself, Richard and all his children *after* the present dispute arose is a circumstance which can be considered in determining whether Richard truly maintained a significant relationship with the Tribe at the time of the twins' birth.

In considering whether the biological parents maintained significant ties to the Tribe, the court should also consider whether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in Tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe. In this regard, we find particularly significant the fact that in the months preceding the birth of the twins, the biological parents turned not to the Tribe or even to other family members,[15] but rather to California's legal process for the purpose of securing the adoption of the twins by a loving family able to care for them. The biological parents did this voluntarily and for reasons which reflected that their primary concern was for the twins' future welfare. Moreover, as already noted, in order to facilitate the adoption process the biological parents expressly and intentionally denied their Indian heritage. Such conduct permits a very strong inference to be drawn about the *absence* of a significant relationship with the Tribe.

5. *If the Trial Court Finds That ICWA Applies, Then a Further Hearing Must Be Held on Whether a Change of Custody Would Be Detrimental to the Twins.*

---

[15]We cannot help but note that Richard's mother, Karen, who appears from the record to be the prime mover in this matter was never made aware of the fact of Cindy's pregnancy until nearly two months after the twins were born. This strongly suggests a family relationship which involved very little social contact. A pregnancy involving twin babies would be difficult to disguise. It would appear that this was a matter which Richard intentionally chose not to share with his mother.

In anticipation of the possibility that the trial court might, upon remand, conclude that ICWA does apply, the R's have filed, and there is now pending in the trial court, a petition for their appointment as guardians of the twins.[16] The biological parents and the Tribe dispute that such a procedure is appropriate.[17] The R's respond that a hearing on their guardianship petition is required in order to protect the constitutional rights of the twins and, in any event, is not precluded by the provisions of ICWA.[18]

---

[16]At the R's request and without objection we have taken judicial notice of the pendency of that proceeding.

[17]Following oral argument on this matter we invited the parties and amici to address by letter brief the issue of the proper procedure to be followed by the trial court in the event that, upon remand, it was determined that ICWA did apply to this case. We have received and considered such additional briefing.

[18]The R's also contend that they are entitled to a hearing on their claim that the twins were abandoned by their birth parents. While that may be technically true, the undisputed record strongly suggests that no abandonment can be proven. In order for the R's to prove abandonment, it would be necessary for them to establish that the biological parents, with the intent to abandon the children, left them in the care of the R's for a period of six months. (Fam. Code, § 7822.) Although Richard manifestly began attempting to have the twins returned to him within six months after their birth, the R's contend he abandoned them within the meaning of the statute, because he did not intend to receive them into his own home, but intended that his sister would raise them. The R's cite *In re Brittany H.* (1988) 198 Cal.App.3d 533 for the proposition that a biological parent who consents to an adoption, then attempts to reclaim the child within six months, will still be found to have abandoned the child if the parents intent in reclaiming the child was not to parent the child himself (or

However, the biological parents and the Tribe contend that, if the trial court ultimately finds that ICWA applies, then (1) the relinquishments of parental rights would be invalid, (2) no basis for an involuntary termination of rights would exist and (3) the twins would have to be returned to the biological parents, without further proceedings. In support of this contention, they cite ICWA sections 1913, subdivision (c), and 1920, as well as Family Code sections 8804 and 8815 and two California cases, *In re Timothy W.* (1990) 223 Cal.App.3d 437 and *In re Cheryl E.* (1984) 161 Cal.App.3d 587.

The California authorities cited are inapposite. Family Code sections 8804 and 8815 are part of the statutory scheme governing independent adoptions and have no application outside of that scheme.[19] For the same reason, *In re Timothy W., supra*, has no

---

herself), but to place the child in another adoptive home. (See 198 Cal.App.3d at pp. 550-551.) While *Brittany H.* does so hold, it is distinguishable in one crucial respect from this case: The mother in *Brittany H.* attempted to reclaim the child from her adoptive home and place her in the home of other people whom the mother had come to prefer, but who were not biologically related to the child and had no other particular claim to the child. (*Id.* at p. 550.) Here, Richard sought to reclaim the twins and place them, not with strangers, but with his sister, a person entitled to preference in the placement of Indian children under ICWA. (25 U.S.C. § 1915.) It would subvert the clear purposes of ICWA if a finding of abandonment could be premised upon the desire of the biological parent of an Indian child to place the child with a member of his extended Indian family.

[19]Section 8804 provides manner of determining the custody of a child who has been placed for adoption if the prospective adoptive family withdraws the petition for adoption, if a birth parent who did not place the child for adoption does not consent to the adoption, or if a birth parent who placed the child for adoption revokes consent pursuant to section 8814.5. In the latter two circumstances, the child

application to this case. In *Timothy W.*, the court held that under the Civil Code statutes which formerly governed independent adoptions, a parent who withdrew consent to an adoption within six months was entitled to have the child returned without the need for judicial findings on the child's best interests. (223 Cal.App.3d at p. 441.) *In re Cheryl E., supra*, is also distinguishable. In that case, the Court of Appeal affirmed a trial court order granting the mother's petition to rescind her relinquishment of parental rights on the ground of fraud and undue influence (161 Cal.App.3d at p. 594); the appellate court found there was no occasion in the rescission action for the child's best interests to be considered, and noted that this issue would be addressed in a separate dependency proceeding, which was pending. (*Id.* at pp. 603-604.)

The contention that ICWA, section 1913, subdivision (c), requires automatic return of the children to the biological parents has somewhat more force. That section provides that "[i]n any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, *and the child shall be returned to the parent.*" (Italics added.) If ICWA applies in this case, then no valid decree or other document effecting a termination of parental rights has been entered, and the biological parents have long since withdrawn their consent. Thus, the Tribe argues, section 1913, subdivision (c), requires the immediate and unconditional return of the children to their biological family.

We disagree. The reach of section 1913 is limited by the twins' interest in having a stable and secure home which, as we have

---

must be returned to the birth parent. Likewise, section 8815 provides for the mandatory return of the child to a birth parent who revokes consent to an independent adoption before the revocable consent becomes permanent.

already concluded, is an interest of *constitutional* dimension. Inasmuch as an individual's interests in matters of family life are "compelling and are ranked among the most basic of civil rights" (*Quilloin v. Walcott, supra*, 434 U.S. at p. 255), and inasmuch as children "are not simply chattels belonging to the parent," but have fundamental, constitutionally protected interest of their own, including "the fundamental right to . . have a placement that is stable [and] permanent" (*In re Jasmon O., supra*, 8 Cal.4th at p. 419), we believe it would constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement, based upon statutory violations which occurred in making the placement, without a hearing to determine whether the child would suffer harm if removed from that placement. (*Stanley v. Illinois, supra*, 405 U.S. at p. 649.) Such a constitutional mandate cannot be avoided by reliance on the *statutory* provisions of ICWA.

However, even under ICWA a change of custody hearing can be justified. Most of its provisions which deal with the custody of children expressly provide that consideration must be given to the child's interests before any order changing a child's custody is made. For example, section 1916, subdivision (a), deals with the issue of return of custody in circumstances substantially like those presented here.[20] It speaks directly to what happens after "a final decree of adoption of an Indian child has been vacated." We do not have that precise situation here; however, we do have something very close: the

---

[20]Section 1916, subdivision (a), of ICWA provides: "Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child."

invalidation of a voluntary relinquishment of parental rights. In both situations, custody of the child would in all likelihood have been given over to the prospective adoptive parents prior to any determination of invalidity. If, because of the application of ICWA, a final adoption is invalidated, or, as in this case, made impossible, the problem is the same: what is to be done about custody? Section 1916, subdivision (a), contemplates and provides something very similar to the procedure which we will require here in the event that the trial court finds that ICWA applies to this case.

Two other sections of ICWA also recognize the importance of the child's interests and needs. Section 1915 provides preferences for the placement of Indian children, but authorizes a different placement if there is good cause and specifically requires that any special needs of the child be considered in making a placement. (§ 1915. subds. (a) and (b).) Section 1915, subdivision (c) authorizes a child's Tribe to specify different preferences, but requires any placement so specified to be "the least restrictive setting appropriate to the particular needs of the child." Section 1920, which prescribes the consequences of an improper removal of a child from the legal custodian, and which the Tribe and biological parents contend requires automatic return of the child, provides that such return need not be ordered if it would subject the child to substantial and immediate danger, or the threat thereof.

In the context of these express provisions within ICWA for consideration of the child's interests in making a custody order, it does no violence to the overall statutory scheme to imply such a provision where it is contended that a child's custody must be changed pursuant to section 1913, subdivision (c), due to a violation of section 1913, subdivision (a).[21] This result is not inconsistent with the intent of

---

[21]Where the biological parent of an Indian child has validly relinquished parental rights under section 1913, subdivision (a), and all parties to the proceedings understand and agree that the Congress.

The legislative history of ICWA reflects the following comment in the House Report of the Interior and Insular Affairs Committee of July 24, 1978: "[T]he committee notes that nothing in those subsections [referring to the subsections of section 1913] prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section [1912], to prevent the return of the child, but does not wish to

---

relinquishment may be rescinded for any reason at any time until the termination of parental rights is final, there is a logical reason to provide for automatic return of the child to the biological parent, although changes of custody in all other circumstances contemplated by ICWA are contingent upon findings respecting the child's best interests and the likelihood of detriment to the child. Moreover, where the risk of removal of the child from a pre-adoptive placement is knowingly and voluntarily assumed by the prospective adoptive family, due process in all likelihood does not require a hearing on the child's best interests before a removal can be ordered. (Cf. *Smith v. Organization of Foster Families, supra*, 431 U.S. 816 ["While the Court has recognized that liberty interests may in some cases arise from positive law sources [Citations], in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional liberty' interest"].) However, the circumstances are different where, as here, an adoption is stymied for reasons that were neither anticipated nor voluntarily agreed upon by the parties, and where the children's custody status would have been permanently settled, but for the unanticipated obstruction. In such circumstances, the most reasonable course is to make a custody order only after weighing the relative rights and interests of the parties--most particularly those of the children.

be understood as *routinely* inviting such actions." (1978 U.S. Code Cong. & Admin. News, at p. 7546; italics added.)[22]

Finally, there is significant case authority for such a custody hearing. The R's and amicus curiae have cited authorities from Colorado, New Jersey and New Mexico, in which the courts recognize that, where an anticipated adoption cannot legally be effected, the child's interests must nevertheless be considered before custody of the child is returned to the biological parent (See *Matter of Custody of C.C.R.S.* (Colo. 1995) 892 P.2d 246. 257-258, cert. denied by *C.R.S. v. T.A.M.* (1995) __U.S.__ [133 L.Ed.2d 69, 116 S.Ct. 118]; *Matter of Adoption of J.J.B.* (1995) 119 N.M. 638 [894 P.2d 994, 1008-1009] cert. denied by *Bookert v. Roth* (1995) __U.S.__ [133 L.Ed 2d 110, 116 S.Ct. 168]; *Sorentino v. Family Children 's Soc. of Elizabeth* (1976) 72 N.J. 127 [367 A.2d 1168, 1170-1171].) The California Supreme Court has also suggested in dictum that where a parent, having the right to do so, vetoes an anticipated adoption, the question of whether custody of the child should be awarded to the parent is a matter for separate determination. (*Adoption of Kelsey S., supra*, 1 Cal.4th at p 851 ["Even if petitioner has the right to withhold his consent (and chooses to prevent the adoption), there will remain the question of the child's custody"].) The Alaska Supreme Court reached the same conclusion in a case involving ICWA. In *A.B.M. v. M.H., supra*, 651 P.2d 1170, cert. denied by *Hunter v. Maxie* (1983) 461 U.S. 914 [77 L.Ed.3d 283, 103 S.Ct. 1893] the adoption of an Indian child was vacated owing to certain statutory violations, and thereafter, the mother petitioned to have the child returned to her custody. (651 P.2d at pp. 1 171-1 172.) The Alaska Supreme Court held that a hearing on the issue of custody would be required, subject to the

---

[22]It cannot be doubted that the R's, with whom the twins have been living since birth in a wholesome and stable environment, are appropriate parties to pursue a guardianship proceeding regarding the issue of the twins' future custody. (See Fam. Code, § 3040, subd. (a) (2).)

provisions of ICWA, section 1912, before a return to the mother could be ordered. (*Id.* at pp. 1175-1176.)

We therefore hold that, if the trial court determines upon remand that (1) ICWA applies in this case, and (2) under ICWA, the voluntary termination of the parental rights of the biological parents is invalid, the court must nevertheless hold a hearing on the question of whether there should be a change of custody. That can best be accomplished in the context of the R's petition to be appointed guardians of the twins.

California's guardianship law offers equitable and constitutionally permissible standards for resolving the question of the proper custody of the twins in the event their pending adoption by the R's fails due to the application of ICWA. These standards look to something more than the twins' "best interests," but rather require an examination of whether a custody change will result in detriment to them. These standards are consistent with the statutory preferences for maintaining a child's custodial ties with the biological parents, but do not require that result if the evidence shows that the child would be harmed if removed from the custody of those persons who have acted as de facto and psychological parents since birth and with whom the child has bonded.[23]

---

[23]We find ourselves entirely in agreement with the comments of counsel for amicus American Academy of Adoption Attorneys who expressed the view that "a custody hearing is required to determine the placement of a child *whenever* an adoption is dismissed or denied, whatever the applicable law. When a child's interests and needs are affected detrimentally by a proposed remedy for a wrong inflicted upon a parent or de facto parent, the law must craft a solution that protects the child. Whether denominated an equitable or constitutional remedy, or a statutory solution, as, for example, the guardianship proceedings available under California law, it is essential that the Court not automatically 'return' children to individuals who are

Such guardianship hearing must be held under the provisions of Probate Code, section 1514, Family Code, sections 3040 and 3041, and ICWA, section 1912, subdivision (e). The burden of proof will necessarily rest upon the R's (Evid. Code, § 500.) The twins shall not be returned to the custody of the biological parents and may instead remain with the R's *if, and only if,* the R's can establish, by clear and convincing evidence, including the testimony of qualified expert witnesses, that a change of custody to the biological parents would be detrimental to the twins, and a grant of custody to the R's is necessary to serve the twins' best interests. (Fam. Code, §§ 3040, 3041; 25 U.S.C.§ 1912, subd. (e); *In re B.G.* (1974) 11 Cal.3d 679, 695, *In re Phillip B.* (1983) 139 Cal.App.3d 407, 421.)[24] In making this

---

socially and psychologically strangers to them. This is not an argument for ignoring the rights and interests of any of the adult parties affected by a failed adoption. In cases like this one, a custody hearing will evaluate the affect on all parties, and especially the twins, of having been placed in what was reasonably understood to be a secure, permanent placement, a placement whose future may now depend on whether the twins will be classified retroactively as Indian children for the purposes of ICWA."

[24]ICWA section 1912, subdivision (e), provides: "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by *clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (Italics added.)

While this section refers to an order requiring "foster care," that clearly would encompass a guardianship proceeding. Under ICWA section 1903, subdivision (1), "foster care placement" is defined to include the placement of an Indian child in the home of a guardian. In addition, section 1912, subdivision (e), by its terms, concerns the determination whether the "continued" custody of a child

determination, the court should take into consideration the likelihood, or lack thereof, that the twins will suffer trauma if separated from the R's.[25]

The court will not be precluded from granting the guardianship petition because of any alleged failure to provide remedial and rehabilitative services to the biological parents, as provided in ICWA section 1912, subdivision (d). ICWA requires such services "to prevent the breakup of the Indian family." The only time at which the "breakup" of the twins' biological family could have been "prevented" was *before* the voluntary relinquishments which were made in this case. At that time, as we have already noted, the biological parents were counseled as required by California law (Fam. Code, 8621 and regulations adopted thereunder [Cal. Code Regs., tit. 22, § 35128 et seq]), concerning the relinquishment and adoption process, alternatives to adoption, resources for financial assistance, employment resources, child care resources, housing resources and

---

with his or her parent or Indian guardian will cause detriment to the child. However, the governing principles and the burden of proof must necessarily be the same where the child is not in such parent's or guardian's custody, and the issue is whether a *resumption* of custody by the parent or guardian will be detrimental. Thus, the "clear and convincing" standard of section 1912, subdivision (e), is the proper one to be applied here. As already noted, the same evidentiary standard is also imposed by California law. (Fam. Code, § 3041; *In re B.G. supra*, 11 Cal.3d at p. 695; *In re Phillip B., supra*. 139 Cal.App.3d at p. 421.)

[25]The R's argue that this court is authorized by Code of Civil Procedure section 909 to make the requisite determinations regarding the children's best interests. Although the R's correctly point out that we have such authority, the needed determinations will require the taking of substantial evidence beyond what is in the existing record, a task which is obviously best undertaken by the trial court.

health service resources which were available to them if they determined not to relinquish their children. Despite such counseling, the parents decided, for good and sufficient reasons, to relinquish the children for adoption. We believe these circumstances adequately establish that active efforts were made to prevent the breakup of the family as required by ICWA section 1912, subdivision (d) and that such efforts were unsuccessful.

CONCLUSION

In this case we have concluded that ICWA cannot be constitutionally applied in the absence of evidence demonstrating that the biological parents had a significant social, cultural or political relationship with the Tribe. On the record before us, we find little or no support for the existence of such relationship. Indeed, the conduct of the biological parents in this matter with respect to the events and circumstances leading up to their relinquishment of the twins strongly suggests that no such relationship existed. However, we cannot conclude, as a matter of law, that the biological parents or the Tribe, upon remand, would not be able to produce additional evidence. Indeed, as a result of the trial court's ruling, none of the parties had any opportunity to present evidence on this critical issue. Therefore, a hearing in the trial court will be required to determine if there is any factual support to establish that the twins were a part of an existing Indian family so as to justify the application of ICWA. On this question, the burden of proof will be on the biological parents and the Tribe. If the trial court concludes that they have not carried their burden, then judgment shall be entered in favor of the R's and they will be free to proceed with the adoption proceedings now pending in Ohio. If the trial court finds otherwise, then it will be necessary to conduct a further hearing on the question of whether there should be a change of custody. The pending guardianship petition filed by the

R's would be a proper vehicle to resolve that question.[26] With respect to this issue, the R's will have the burden of proof.

---

[26]In addition to the major issues on this appeal, the parties raise a number of minor contentions which may be dealt with parenthetically. Neither Richard's rights nor the Tribe's rights are affected by the circumstance, even if true, that Richard is not a presumed father. Regardless of state laws affecting the rights of unwed fathers, ICWA applies if a child is the biological child of a member of an Indian tribe. Nor are the rights of any party affected by the circumstance that the twins are only three thirty-seconds Indian. ICWA's application depends upon tribal membership, including the maintenance of significant contacts with the tribal community. It is not affected by any quantum of Indian blood, although such fact may have evidentiary value on the issue of whether there was an existing Indian family.

We need not address the issue of whether the Tribe should be precluded from invoking ICWA by retroactively enrolling Richard and the twins as tribal members, inasmuch as we have concluded that mere recognition by a tribe is, in any event, not sufficient to establish a significant tribal relationship for purposes of the application of ICWA.

Finally, where the biological parents concealed Richard's Indian heritage in order to facilitate the twins' adoption, equity might require that they be estopped from invoking ICWA to prevent it. However, such estoppel can have no practical effect upon the ultimate result in this case, because the Tribe has independent rights to object to the severance of its relationship to tribal children. In *Holyfield, supra*, 490 U.S. 30, the Supreme Court held that where a birth parent intentionally relinquished an Indian child for adoption, and never renounced or revoked the relinquishment, the Tribe retained its separate rights to have the relinquishment vacated over the birth parent's express objection. (490 U.S. at pp. 49-53.) A fortiori, if ICWA

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is granted. The order vacating the termination of the parental rights of Richard A. and Lucy R. over the minors Lucy and Bridget R. is reversed. The matter is remanded, and the trial court is ordered to conduct further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to the R's and Vista Del Mar.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.

---

properly applies in this case, the Tribe has the right under 25 U.S.C. section 1914 to separately petition for vacation of the termination of the parents' rights, regardless of any estoppel which might operate against the parents, and the effect upon the twins' custody status will be the same.

APPENDIX B

B-1 NO CHANGE IN JUDGEMENT
CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re BRIDGET R., et al., Minors.	
JAMES R. AND COLETTE R., and VISTA DEL MAR,	B093520 (Super.Ct.No. BN1980 consol. w/ BC114849
Petitioners and Appellants,	
v.	
CINDY R. AND RICHARD A.,	ORDER DENYING PETITIONS FOR REHEARING AND MODIFYING OPINION
Objectors and Respondents.	
DRY CREEK RANCHERIA, ET AL.,	
Intervenors and Respondents.	
In re BRIDGET R., ET AL., MINORS.	B093694
JAMES R. AND COLETTE R.,	
Petitioners,	
v.	
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	
Respondent;	
CINDY R., RICHARD A., AND DRY CREEK RANCHERIA,	
Real Parties in Interest.	

The Petitions for Rehearing filed by the biological parents and the Tribe are denied. The opinion filed in the above-captioned action on January 18, 1996 is modified as follows:

On page 9, in line 15, delete "promulgated pursuant to Family Code section 8621." In line 16, after the closing parenthesis, insert "promulgated by the Department of Social Services, pursuant to legislative authority (Welf. & Inst. Code, § 10553; see now Fam. Code, § 8621)," so that the second sentence of paragraph 3 on page 9, exclusive of the footnote, reads:

> "On November 11 and 12 respectively, after receiving counseling concerning the relinquishment and adoption process as required by regulations (Cal. Code Regs., tit. 22, § 35128 et seq.) promulgated by the Department of Social Services, pursuant to legislative authority (Welf. & Inst. Code, § 10553; see now Fam. Code, § 8621), Richard and Cindy signed documents relinquishing the twins to Vista Del Mar, with the intent that they would be adopted by the R's.

On page 57, in lines 8 to 9, beginning after the opening parenthesis near the end of line 8, delete "Fam. Code, § 8621 and regulations adopted thereunder"; in line 9, delete the space and the opening bracket before "Cal.Code of Regs," and delete the closing bracket after "et seq.," so that the fourth full sentence on page 57 reads:

> "At that time, as we have already noted, the biological parents were counseled as required by California law (Cal. Code Regs., tit. 22, § 35128 et seq.), concerning the relinquishment and adoption process, alternatives to adoption, resources for financial assistance, employment resources, child care resources, housing resources and health service resources which were available to them if they determined not to relinquish their children."

There is no change in judgment.

APPENDIX C

C-1

No.2/3 B093520-S052021

IN THE SUPREME COURT OF CALIFORNIA

IN RE BRIDGET R.et al.,Minors

JAMES R.et al.,Appellants

v.

CINDY R. et al.,Respondents

Petitions for review DENIED.

Kennard, J. is of the opinion review should be granted.

The request for an order directing depublication of the opinion is denied.

Mosk, J. did not participate.

George

Chief Justice

APPENDIX D

. . . . . 25 U.S.C. sections 1901-1916

1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

1902. Congressional declaration of policy

Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the security of Indian tribes and families by the establishment of minimum standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term-

(1) "child custody proceedings shall mean and include-

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement: and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent:

(3) "Indian" means any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodians" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or

organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 1602 (c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe or any other administrative body of a tribe which is vested with authority over child custody proceedings.

1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian Child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or

domicile of the child.

(b) Transfer of process; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciles or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

1912. Pending court proceedings

(a) Notice: time for commencement of proceedings: additional time for preparation

In any involuntary proceeding in a State court, where the court

knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) services and rehabilitative programs preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage to the child.

(f) Parental rights termination orders; evidence, determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters: invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such

consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement, withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent, return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination, or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in State court, the parent may withdraw consent thereto upon the grounds consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the

provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe, or (3) other Indian families.

(b) Foster care or preadoptive placements, criteria; preferences

Any child accepted for foster care or preadoptive placement shall placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement a preference shall be given, in the absence of good cause to the contrary, to a placement with-

(i) a member of the Indian child's extended

family,

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered, anonymity In application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order, so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§1916. Return of custody

(a) Petition best interests of child

Notwithstanding State law to the contrary. whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home, placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Supreme Court, U.S.
FILED
MAR 5 1997
CLERK

No. 96-828

In The

Supreme Court of the United States

October Term, 1996

DRY CREEK RANCHERIA,

Petitioners,

vs.

BRIDGET and LUCY R., JAMES R. and COLETTE R. and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

JAMES R.'S AND COLETTE R.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN L. DODD, ESQ.
222 Fashion Lane, Ste. 108
Tustin, CA 92680
Tel. (714) 731-5572
Fax (714) 731-0833
Counsel of Record for Respondents James and Colette R.

JANE A. GORMAN, ESQ.
513 E. First St., 2nd Floor
Tustin, CA 92680
Tel. (714) 731-3600
Fax (714) 731-7760

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Can the question of whether Bridget and Lucy R. are "Indian" children within the meaning of the Indian Child Welfare Act ("ICWA") be properly presented to this Court when the California state court has not finally decided this question but has remanded the case to a state trial court to hear evidence and make findings of fact regarding the political, cultural and social relationship between the children's biological father and the Indian Tribe which claims an interest in these children?

2. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., creates a race-based classification which deprives them of Equal Protection under the Fifth and Fourteenth Amendments be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop the missing factual record?

3. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., denied these particular children of partial Indian descent Due Process of law under the Fifth and Fourteenth Amendments be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop the missing factual record?

QUESTIONS PRESENTED – Continued

4. Can the question of whether the ICWA, as applied to the specific case of Bridget and Lucy R., exceeds the scope of Congress' powers under the Indian Commerce Clause and is violative of the Tenth Amendment be properly presented to this Court in the absence of a complete factual record regarding the political, social, and cultural connections between the twins' biological father and any Indian Tribe when the Court of Appeal did not finally decide this question but instead remanded the case for a hearing to develop a factual record regarding the twins' biological father's asserted relationship, if any, to the Tribe?

5. Whether this Supreme Court has jurisdiction under 18 U.S.C. section 1257 to render an advisory opinion as to the issue of whether the due process rights of Bridget and Lucy R. require a guardianship hearing in the event the trial court on remand finds the twins are "Indian" children within the meaning of the ICWA.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

REASONS FOR DENYING THE PETITION 12

1. The Petition Should Be Denied Because This Case Is Not Final and, Therefore, This Supreme Court Lacks Jurisdiction under 28 U.S.C. Section 1257 12

2. The Petition Should Be Denied Because It Relies on Numerous Misstatements of Fact and Law 17

3. The Statutory Interpretation Issue Concerning the Existing Indian Family Doctrine Is Not Properly Presented to this Supreme Court for Resolution ... 20

4. The Question of Whether or Not Application of the ICWA to this Particular Case Denies the Twins Equal Protection of the Laws Is Not Properly Presented to this Supreme Court 23

5. The Issue Concerning Whether or Not the Application of the ICWA to this Case Violates the Twins' Right to Due Process of Law Is Not Properly Presented to this Court 25

6. The Issues of the Effect of the Enumerated Powers Doctrine and Tenth Amendment Are Not Properly Presented to this Supreme Court 26

TABLE OF CONTENTS – Continued

Page

7. The Tribe Has Waived Its Preemption Arguments Because It Did Not Raise Them in the Lower Courts 28

8. The Question of Whether or Not the Twins Are Entitled to a Custody Hearing Does Not Meet the Jurisdictional Prerequisite for a Grant of Certiorari 28

9. The Petition Should Be Denied Because the Twins Need to Have this Matter Resolved as Expeditiously as Possible 29

CONCLUSION 29

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Delaware Tribal Business Commission v. Weeks, 430 U.S. 73 (1976) 24

Cincinnati Street Railway Company v. Snell, 179 U.S. 395 (1900) 12

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 15

Flynt v. Ohio, 451 U.S. 619 (1981) 16

Houston v. Moore, 16 U.S. 433 (1818) 12

Minnick v. California Department of Corrections, 452 U.S. 105 (1981) 13

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 21, 22

Morton v. Mancari, 417 U.S. 535 (1974) 23

North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973) 14

Oklahoma Tax Commission v. Chickasaw Nation, ___ U.S. ___ [115 S.Ct. 2214, 2217, 2223] (1995) 24

United States v. Antelope, 430 U.S. 641 (1977) 24

United States v. Lopez, ___ U.S. ___ [131 L.Ed. 626, 115 S.Ct. 1624] (1995) 27

Vance v. Terrazas, 444 U.S. 252 (1980) 19

Youakim v. Miller, 425 U.S. 231 (1976) 28

OTHER FEDERAL CASES

Brown v. County of San Joaquin, 601 F.Supp. 653 (E.D. Cal. 1985) 25

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

25 U.S.C. section 1911 27

28 U.S.C. section 1257, subdivision (a) ..... *passim*

CALIFORNIA APPELLATE CASES

In re Alexandria Y., 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679 (1996) 22

In re Bridget R., 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507 (1996) 2, 13, 20, 22, 25

In re Jamie G., 196 Cal.App.3d 675, 241 Cal.Rptr. 869 (1987) 25

CALIFORNIA STATUTES

California Family Code section 8700 .....19, 25

California Family Code section 8815, subdivision (a) 19

Evidence Code section 452, subdivision (c)..... 6

RULES OF COURT

Supreme Court Rule (14)(1)(a) 19

Supreme Court Rule 15(2) 17

OTHER STATE AUTHORITY

Matter of Adoption of a Child of Indian Heritage, 111 N.J. 155 [543 A.2d 925] (1988) 21

In re the Custody of A.K.H., 502 N.W.2d 790 (Minn.App. 1993)..... 20

TABLE OF AUTHORITIES – Continued

Page

A.B.M. v. M.H. & A.H., 651 P.2d 1170 (Alaska 1982) *cert. denied sub. nom Hunter v. Maxie*, 461 U.S. 914 (1983) 20

Adoption of T.N.F., 781 P.2d 973 (Alaska 1989) *cert. denied sub. nom Jasso v. Finney*, 494 U.S. 1030 (1990) 21

In re Hampton, 658 So.2d 331, 334-335 (La.App. 1995) *cert. denied sub. nom J.A.L. v. Hampton*, ___ U.S. ___, 116 S.Ct. 1549 (1996) 21

In the Matter of S.C., 833 P.2d 1249 (Okla. 1992) 20

In the Matter of the Guardianship of D.L.L. and C.L.L, 291 N.W.2d 278 (S.D. 1980) 27

Matter of Adoption of Crews, 118 Wash.2d 561, 825 P.2d 305 (1992) 21, 22

Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) *cert. denied sub. nom J.Q. v. V.D.R.L.*, 490 U.S. 1069 (1989) 20

TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UNITED STATES:

Respondents and adopting parents, James and Colette R., by and through their counsel of record, hereby answer and oppose the petition for writ of certiorari filed by the intervenor, Dry Creek Rancheria of Pomo Indians. The R.s respectfully request this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, in this case.

INTRODUCTION

This case concerns the interplay between the federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq. ("ICWA")) and California state adoption and parental rights law in the context of a voluntary, agency adoption valid under California law. James and Colette R. are the adoptive parents of twin girls, Bridget and Lucy R. The girls are 3/32 American Indian through their biological father, Richard A. According to the record developed so far, neither the girls nor Richard have ever lived on a reservation, nor has Richard had any significant social, cultural or political relationship with the tribe or with Indian cultural life. The Court of Appeal correctly understood the ICWA was never meant to apply to situations such as this, and ruled application of the Act to this type of case unconstitutional, holding:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a

> significant social, cultural or political relationship with their tribe." (*In re Bridget R.*, 41 Cal.App.4th 1483, 1492, 49 Cal.Rptr.2d 507 (1996).)

However, recognizing the factual record regarding the biological father's asserted relationship with the tribe was incomplete because the trial court precluded any inquiry into this area, the Court of Appeal then remanded the matter to the trial court for an evidentiary hearing on the factual question of whether or not the twins' biological parents "had such a relationship at the time that they voluntarily acted to relinquish their parental rights under California law." (*Ibid.*)

Not only is the Court of Appeal's legal conclusion correct and in accord with numerous recent cases emanating from this Supreme Court, the key federal issues in this case are still to be determined on remand. Therefore, there is no final judgment as required for Supreme Court jurisdiction pursuant to 28 U.S.C. section 1257, subdivision (a). This case is not yet in the proper posture for a grant of a writ of certiorari. This Supreme Court denied the petition for writ of certiorari filed by the biological parents raising identical issues, Docket Number 96-5971, on January 6, 1997. The tribe's petition should be denied as well.

STATEMENT OF THE CASE

Initial Placement for Adoption

The twin girls, Bridget and Lucy R., were born on November 9, 1993, in West Covina. (CT 3077 & 3081.[1])

---

[1] "CT" refers to the 19-Volume Clerk's Transcript filed on or about August 9, 1995. "RT1" refers to the 5-Volume Reporter's Transcript Appellants filed in support of their Petition for Writ of Supersedeas. "RT" refers to the 236-page

Cindy is the biological mother of the girls, and Richard is listed on their birth certificate as the father. (*Ibid.*) Richard was 23 years old. He was born April 11, 1972. (CT 3094.) The R.s took the twins home to Ohio after their birth. (CT 2040-2044, RT1 408.) On May 4, 1994, the R.s filed a petition to adopt Bridget and Lucy in Ohio. (Jud. Ntc. Ex. 1.)

When Cindy was about six or seven months pregnant, she and Richard decided to place the children for adoption. (RT1 620.) Attorney Durand Cook first met with Cindy and Richard in August 1993. (RT1 889.) He learned Cindy had Indian heritage but then learned the tribe in question was a Mexican tribe. (RT1 895-896.) Cook testified he asked Richard if he had any Indian heritage, and Richard replied, "No." (RT1 896.) Richard did not tell him he was a tribal member at any point prior to the twins' birth. (RT1 897.) He denied encouraging either of the birth parents to lie about their heritage. (RT1 897.) Cook testified he first learned of an Indian heritage issue in February or March 1994. (RT1 899.)

However, Cook later testified on one intake questionnaire Cindy had written Richard was a portion American Indian and Cook had written "Pomo." (RT1 1025-1027, 1055-1057, see CT 2080.) He did not disclose this to the R.s. (RT1 1027.) Cook "explained what the ramifications would be if there was an Indian heritage issue, and what steps that we would need to take to clear that if they wished to place their children for adoption." (RT1 1081-1082.) He also asked them direct questions, and the

---

Reporter's Transcript filed on or about August 11, 1995. Instead of complying with Appellants' designation of reporter's transcript on appeal (CT 1913), the Superior Court prepared a Reporter's Transcript containing transcripts of only those proceedings not previously filed with the Court of Appeal. "RTC" refers to the corrected transcript supplying a missing page which was filed concurrently with the Opening Brief.

"gist" of his conclusion was "that Cindy had Indian heritage, but the Indian heritage, based on her discussion and her mother's discussion, was definitely of Mexican ancestry, and that Richard had no Indian heritage, regardless of what was on the intake questionnaire." (RT1 1082.) He asked Richard who "answered there were [sic] no Indian heritage." (RT1 1083 & RT1 1079.)

Signing of Relinquishment Forms

During the ninth month of Cindy's pregnancy, she and Richard met with a social worker from Vista Del Mar Child and Family Services ("Vista Del Mar"), an adoption agency. (*Ibid.*) On November 11, 1993, two days after the twins' birth, Richard signed relinquishment documents at Vista Del Mar's offices, by which he relinquished and surrendered the twins for adoption with the intent they be placed for adoption with James and Colette R. (CT 2876-2878, RT1 622-623.) He understood that, once he signed the relinquishments, he would have no further rights to the children. (RT1 623-624.)

He signed of his own free will. (RT1 665-666.) When he signed, he understood he was intending to give up all parental rights to Bridget and Lucy. (RT1 680-681.) The forms recited: "I/We fully understand that in all other circumstances [other than if the children were not placed with the R.s] when this relinquishment is filed with the headquarters office of the Adoptions Branch of the California Department of Social Services by said agency, all my/our rights to the custody, services and earnings of said minor child and any responsibility for the care and support of said minor child will be terminated." (CT 2876-2878.)

Richard wrote he wanted the children adopted because "I already have 2 kids I dont [sic] make enough money to support myself yet. I'm going to school to get a

better job. I can't not [sic] afford 2 more children nor am I ready for more kids right now." (CT 2858.)

On the form entitled "Social And Medical History – Biological Father" dated November 9, 1993, Richard listed his "customs, traditions and values that come from cultural influences: as "Irish, German, Welsh, Spanish." (CT 2894, RT1 686.) On another form for Vista Del Mar, Richard checked the "no" box next to the question "Are you, either or your parents or any other relatives an American Indian?" (CT 2856, RT1 636.) At a second place on the forms where the ethnic heritage of his parents could be noted, Richard did not check any box. (CT 2859.) Richard listed his "basic ethnic group" as "white." He did not check the box for "American Indian or Alaskan Native." Nor did he fill in anything on the line following the statement: "If American Indian or Alaskan Native, please specify name of tribe and degree of Indian blood." (CT 2857.)

Richard testified he did not disclose his Indian heritage because he did not want the adoption stopped. (RT1 636-637.) Cook told him a federal law "would just stop the case." (RT1 637.) Richard knew he was lying on the form. (RT1 651.)

On the "Information About the Birth Father" form, Richard noted his mother, Karen A., lived in West Covina, a suburb of Los Angeles, and that he had been born in West Covina as well. (CT 2854.) Richard also signed a "Witness Statement" which verified he and Cindy had been informed regarding various public assistance programs, and they were acting of their own free will. (CT 2867.) The form also contained the advisement this was "an agency adoption and that after filing the documents in Sacramento, the termination of parental rights is considered final. The child could only be returned to the birth parents upon mutual agreement between the birth parents and the Director of Community Services at Vista Del Mar Child & Family Services. It is the policy of the

Agency not to rescind adoptions after filing with Sacramento." (*Ibid.*) Richard signed another form stating he had been fully advised of his rights regarding revocation and recision of the relinquishment. (CT 2868.) The relinquishments were filed with the Adoptions Branch of the Department of Social Services on November 23, 1993. (CT 3113-3114[2].)

Enrollment of Richard, Karen and the Minors in the Tribe

The Dry Creek Rancheria of Pomo Indians ("Rancheria") has about 225 enrolled members, about 25 of whom live on the Rancheria in Northern California. (CT 3050-3951.) The tribe first learned of Bridget and Lucy on or about January 21, 1994. (CT 3051.) Karen A. submitted the twins' applications for enrollment in the Tribe on or about March 4, 1994. This was the same time Richard's application for enrollment was submitted. (CT 3052-3056.) Karen A. also submitted her own application for enrollment on or about March 4, 1994. (CT 3057.) As of November 11, 1993, neither Richard nor the twins were enrolled members. (CT 3065 & 3072.)

Richard's Lack of Contact with the Pomo Tribe

Grandmother Karen had lived in West Covina, in Southern California, for nineteen years. (CT 2754.) Karen had never voted in tribal elections. (CT 2766.) She had not held an office in the tribe. (*Ibid.*) She had not taken Richard, who was twenty-two years old at the time of the

---

[2] Although there was not an opportunity to enter these documents into evidence, the acknowledgment of them by the Chief of the Adoptions Branch of the Department of Social Services constitutes an official act of the executive branch of the State of California of which the Court of Appeal was requested to take judicial notice. (Cal. Evid. Code § 452, subd. (c).)

deposition, to visit the reservation since he was "probably about seven, seven years old." (CT 2767.) Karen did not know, even approximately, how many Pomos were living in California. (CT 2775-2776.) Karen had enrolled everyone in the tribe in January because it was a period of "open enrollment" to obtain benefits. (CT 2786.)

Richard had lived in Stockton, Norwalk, Whittier, West Covina and Azusa. (CT 2377-2379.) He attended West Covina High School. (CT 2380.) As a youth he always lived in Southern California. (CT 2386.) He did not know his percentage of Indian blood. (CT 2388.) He had forgotten the name of the tribe to which he assertedly belonged. (*Ibid.*) He had never been to any tribal meetings. (CT 2389.) Richard believed he had never been to the reservation. (CT 2391.) He had never received any financial benefits from the tribe. (*Ibid.*) When asked, "What do you know about your tribe?," Richard replied, "Not very much." (CT 2393.) He believed his great-aunts spoke the Pomo dialect, but he could not remember their names. (CT 2394.) Richard did not know whether the Pomo Tribe was the same as the Dry Creek Rancheria. (CT 2493.) He did not have any idea when his mother enrolled the twins in the tribe. (CT 2509.) Richard had forgotten the name of the tribe at his deposition in December 1994. (RT1 795.)

Best Interest of the Twins and Their Bonding to the R.s

On May 23, 1995, the R.s filed a declaration of Dr. Kenneth Fineman, a clinical and forensic psychologist, in opposition to a proposed "visitation" order. (CT 886.) Dr. Fineman explained the twins "are appropriately bonded to the R[]s, perceiving them as their psychological parents. The twins are also bonded to their sister Hannah." (CT 887.) Dr. Fineman continued, "The research data available is quite clear. The R[.] twins, if transferred to strangers (those other than whom they are attached to),

will develop an attachment disorder. This attachment disorder is more likely than not to produce irreparable harm to the children. It will have significant short-term effects which include depression, anxiety, despair, health difficulties, proneness toward depression, and proneness toward physical illnesses." (CT 888.) Dr. Fineman also detailed the long-term detriment to the twins which would result if they were removed from the R.s. (*Ibid.*)

On May 24, 1995, Dr. Fineman testified the twins would suffer an attachment disorder if separated from the R.s. (RT1 406.) This would result in "anxiety, and anxiety symptoms, which can be yelling and screaming and tantruming or it can become psychotic in nature." (RT1 407.) Dr. Fineman continued: "The next step is usually despair, simply based on the fact that the child does not know where his or her primary care-givers are, and as such, the child shows signs of depression, sleeping difficulties, insomnia, social withdrawal, a proneness towards illness of various sorts, as well as proneness towards depression." (*Ibid.*) The R.s are the twins' psychological parents and are "the only parents or caregivers that the children have known since birth. . . . " (RT1 407-408.)

Cindy and Richard's other two children were living in a shelter at the time they met with Cook. (RT1 816.) The only financial support he was giving her was $20 every now and then. (RT1 819.) Cindy received AFDC for the other children. (RT1 827.) Cindy had obtained restraining orders against Richard in April 1994 (CT 2956) based on her sworn allegations Richard "has physically and verbally abused me." (CT 2961.) Cindy alleged he pulled her "hair, kicked, hit and pushed" her on March 21, 1994. (*Ibid.*) She also alleged he got drunk during the week of March 14, 1994, and hit her and shoved her down when she would not give him money. (*Ibid.*) He also broke furniture. (*Ibid.*) Cindy declared under penalty of perjury, "These kinds of incidents occurred up to 3 times

a week. The violence is extreme. Our 2 children witnessed the fighting. They also were abused by the defendant. He would pick up the children by their necks and shake them or drop them, poke them in the face, or hit them on the head. On occasion he would hurt the children out [of] anger toward me." (*Ibid.*)

Procedural History

In order to obtain a judicial resolution of the issues raised by Richard and his mother but which they had not pursued, on September 13, 1994, the R.s filed a petition to declare Bridget and Lucy free from parental custody and control pursuant to Family Code section 7822. (CT 1.) The petition alleged the biological parents had left the girls in the R.s' care continuously since November 9, 1993, with the intent to abandon them. (*Ibid.*) On October 17, 1994, the Rancheria filed a Motion to Intervene. (CT 13.) On October 20, 1994, Vista Del Mar filed a declaratory relief action to determine the applicability of the ICWA in this case, Case No. BC114849. (CT 21 & 195.)

On October 27, 1994, the R.s filed their opposition to the Rancheria's motion to intervene. (CT 28.) The R.s contended the respondents had not established by competent evidence the twins were Indian children and requested an evidentiary hearing on that issue. They also contended the ICWA did not apply because neither the twins nor Richard were part of an "Indian" family. (CT 36.) On November 3, 1994, the trial court consolidated the two cases and ruled the tribe could participate in these proceedings. (CT 127.)

On May 17, 1995, the trial court found the minors were "American Indian pursuant to the ICWA" and they were members of the Dry Creek Rancheria. (CT 885, RT1 354.) On June 6, 1995, the trial court found the relinquishments "invalid" pursuant to 25 U.S.C. section 1913, subdivision (a). (CT 1772, RT1 556.) On June 14, 1995, the

trial court ruled the ICWA was not unconstitutional and declined to recognize the existing Indian family doctrine. (CT 1856.) The court ruled, "[a]pplication of ICWA in this case preclude R[]s from going forward with state abandonment petition." (*Ibid.*) The court ordered the twins transferred to the grandmother Karen A. the next day, June 15, and appointed the A.'s temporary guardians. (CT 1856, RT1 1156.) The R.s requested the order transferring custody be stayed pending appeal, which request was denied. (CT 1856.) Karen A.'s guardianship orders were filed June 16, 1995. (CT 1873, 1874, 1876.) On June 14, 1995, the R.s filed a notice of appeal. (CT 1857.) On June 15, 1995, the R.s petitioned the Court of Appeal for a writ of supersedeas to preserve the status quo pending resolution of the appeal. After issuing a temporary stay that day (CT 1864) and after hearing oral argument on July 19, 1995, the Court of Appeal issued the stay pending appeal on July 21, 1995. On January 18, 1996, the Court of Appeal issued its opinion in which it reversed the trial court's judgment and granted the R.s' writ petition. On May 15, 1996, the California Supreme Court denied petitions for review which had been filed by the biological parents and the tribe.

Richard and Cindy petitioned for certiorari in this Supreme Court, which petition was denied January 6, 1997, case number 96-5971.

SUMMARY OF ARGUMENT

The petition should be denied because there is, as of yet, no final judgment in the California courts ruling as to whether or not the twins are "Indian" children within the meaning of the ICWA. That matter was left for a trial court's determination on remand. Until that determination has been made, the ICWA issues in this case are not ripe for Supreme Court review, and the fundamental requirement for jurisdiction under 28 U.S.C. section 1257,

subdivision (a) is not met. Additionally, as to the issue of whether or not the twins are entitled to a custody hearing even if the ICWA applies, that surely is not ripe for review because there has been no final determination as to whether or not the ICWA will be applied in this case. Therefore, whether or not the ICWA issues are properly presented for review, surely the custody hearing and state-law guardianship issues are not properly before this Court because those issues only come into play after a judicial determination the ICWA applies in this case.

Furthermore, the petition is fraught with half-truths, procedural omissions and misstatements, and misrepresentations of fact and law. This, alone, justifies its denial. Chief among these is the repeated representation that Bridget and Lucy are "Indian children." The twins are not "Indian children" under the ICWA. That is the issue to be determined on remand. The twins are children of partial Indian descent whose biological parents never had any relationship with an Indian reservation or Indian culture. Specifically, they are only 3/32 Indian. Because the tribe's petition rests entirely on this false premise, it must be denied.

Moreover, the petition should be denied because the California Court of Appeal opinion was thorough, scholarly, and correct legally. The Court of Appeal had the benefit of extensive briefing and the assistance of numerous amicus curiae briefs from various organizations from throughout the nation. In contrast to various other state court opinions in which the constitutional issues have been dealt with in a summary fashion, this particular opinion includes extensive analysis of these issues after thoughtful consideration of the most recent opinions from this Supreme Court. The ICWA was never meant to apply to cases such as this in which neither the children nor their parents have had any significant social, cultural or political ties to a reservation or Indian life. To force children who are only of partial Indian descent and

who have no social tie to Indian life to be bound by the ICWA is to apply merely a genetic test. This is pure racial discrimination which is not permitted by the United States Constitution. Furthermore, to apply this Federal law to divest a state of its traditional role to determine matters of family law violates the Tenth Amendment to the United States Constitution and exceeds the enumerated powers of Congress.

Finally, the tribe's petition should be denied because the minors, who now are three years old, require some finality in their lives.

REASONS FOR DENYING THE PETITION

1. The Petition Should Be Denied Because This Case Is Not Final and, Therefore, This Supreme Court Lacks Jurisdiction under 28 U.S.C. Section 1257.

This Court lacks jurisdiction to grant certiorari because the Court of Appeal's opinion is not a "final judgment" under 28 U.S.C. section 1257. Although the opinion of the California Court of Appeal must be implemented by the trial court, there is no final decree that the twins are, or are not, "Indian" children under the ICWA. Therefore, this case is not yet in the appropriate posture such that certiorari may be granted.

The ICWA questions have been remanded for a new trial. Therefore, there is not a final judgment which this Court may review. (*Houston v. Moore*, 16 U.S. 433, 433 (1818).) As this Court ruled in *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395 (1900) :

> "This writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court." (*Id.* at 397.)

James and Colette are confident Richard, Cindy and the Rancheria will not be able to demonstrate on remand that Richard "maintain[ed] significant social, cultural or political relationships with the Tribe." (*In re Bridget R.*, 41 Cal.App.4th at 1513.) Therefore, the ICWA will not apply to this case at all, and the adoption will proceed. Even if the ICWA applies, James and Colette are confident they will be able to demonstrate "by clear and convincing evidence, including the testimony of qualified expert witnesses, that a change of custody to the biological parents would be detrimental to the twins" (*Id.* at p. 1520), and, therefore, they will maintain custody of the twins. However, a hearing on these issues is required, and there is at least a theoretical possibility Richard and Cindy will be successful. Because there remains a possibility Richard and Cindy will be able to establish the ICWA applies to this case and thereafter a possibility they will obtain custody of the children, this case is not yet final for the purposes of Supreme Court review.

One of the key questions here is whether constitutional issues are presented in a " 'highly abstract form' " and whether "further proceedings in the state court would ultimately tender 'the underlying constitutional issues in clean-cut and concrete form.' " (*Minnick v. California Department of Corrections*, 452 U.S. 105, 123 (1981).) Until the rehearing on the issue of the applicability of the existing Indian family doctrine to these particular litigants is completed, the questions in this case are being presented to this Supreme Court in an abstract form. In the case below, *no factual record on the constitutional issues and statutory issues was ever created*. The trial court specifically prevented the R.s' counsel from introducing evidence concerning the asserted connection, or lack thereof, with the tribe. (RT1 809 & 1109, RT 126.) This case cannot be final for the purposes of 28 U.S.C. section 1257 when a remand is necessary not merely to resolve ambiguities

but also to find the very facts essential to deciding the questions presented.

The requirement of finality "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' . . . ; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." (*North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).) This case implicates all three evils enumerated in *North Dakota Pharmacy Board*. First, a grant of certiorari at this stage would surely lead to piecemeal review by this Court of a state court decision. Without a complete factual record concerning the biological father's relationship to the Tribe, this Court cannot finally decide the questions petitioners claim are presented. A grant of certiorari will only delay the orderly unfolding of the case in the courts of California because, if certiorari is granted, this Court inevitably will be forced to remand the case for the fact finding which petitioners now seek to avoid. The proper procedure is to await a final judgment at the trial court, appeal through the California system, at which point the federal statutory and constitutional issues will probably be ripe for adjudication by this Court.

Second, this case presents the danger of issuing advisory opinions in the absence of a real case or controversy. The statutory, equal protection, due process, Indian Commerce Clause and Tenth Amendment questions which petitioner claims are presented in this case are not final and will not be ripe for review until petitioner (1) fails to prevail in showing that Bridget and Lucy are "Indian" children, and (2) the biological parents fail to prevail in a guardianship hearing. Most particularly, in order to address the question of whether Bridget and Lucy have a due process right to a guardianship hearing, this Court would necessarily be rendering an advisory opinion,

since this statement in the California Appellate Court's opinion will never be applied to resolve an actual case and controversy unless and until the trial court, after hearing all the evidence, finds Lucy and Bridget are "Indian" children.

Third, the evil of unnecessary federal court intrusion in state affairs is especially salient in this case. The Supreme Court of California did not hear and decide this case on the merits, nor did it uphold a final judgment conclusively denying petitioners the relief they seek. It simply denied review of the appellate court opinion which had remanded the matter to the trial court for an evidentiary hearing. Petitioners seek to circumvent the state court fact finding and to take their case straight to this Court, bypassing the process of the California court system.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court explained:

> "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '(f)inal judgment or decree.' Title 28 U.S.C. § 1257 retains this limitation on our power to review cases coming from state courts. The Court has noted that '(c)onsiderations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " (*Id.* at pp. 476-477, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).)

Although *Cox* went on to describe specific exceptions to the finality rule, this Court later explained:

> "[W]e observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues." (*Flynt v. Ohio*, 451 U.S. 619, 621 (1981).)

Not one of the exceptions discussed in *Cox* allows review in the face of a pending state court remand for fact-finding which the Court of Appeal has held is essential to its ability to render a judgment on the very constitutional and federal claims raised in the petition for certiorari. Because the federal issue of whether or not the existing Indian family doctrine is applicable to these particular litigants is the question to be resolved on remand, a subsequent appeal from that retrial – and probably a subsequent petition for writ of certiorari to this Supreme Court – are inevitable. This would result in piecemeal review of the questions involved in this case which would be inappropriate. Therefore, none of the ICWA issues presented are properly presented for review by this Supreme Court.

Essentially, the California Court of Appeal accepted the R.s' "as applied" challenge to the constitutionality of the ICWA. By definition, such a challenge must involve fact-finding before it truly is ripe for review by this Supreme Court. The Petition for Writ of Certiorari asks this Court to review this "as applied" statutory and constitutional challenge without the benefit of judicial findings regarding the specific situation of these parties. Petitioner's brief is rife with assertions of fact which involve disputed allegations, turning on issues of credibility and weight of evidence. Since only the trial court on remand has the capacity to resolve disputes of fact and develop the record necessary to deciding the statutory and constitutional issues, a final judgment has not been

rendered. Because that fact-finding has not yet occurred, the petition must be denied.

2. The Petition Should Be Denied Because It Relies on Numerous Misstatements of Fact and Law.

Rule 15(2) requires opposing counsel to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The tribe's petition contains numerous misstatements of both fact and law which bear on the issues in this case. Respondents have set forth above a statement of case which fills in some of the gaps left by many of the factual omissions of the petition. However, the omissions are not as glaring as the misstatements of fact and law in this case which require the petition be denied.

The most egregious of these misstatements is the repeated refrain Bridget and Lucy are "Indian" children. They are not "Indian" children, either factually or legally. Even more disturbing is the tribe's refrain its contention the twins are "Indian" children is "uncontroverted." (Pet. p. 2.) Because that is the primary issue in this case, it is very hotly disputed indeed. Similarly, it is not "undisputed" the Court of Appeal's ruling "violates the express provisions of the ICWA." (Pet. p. 3.) The R.s, and assumedly the Court of Appeal, do indeed dispute this. The issue in this case is whether the ICWA applies at all, not whether or not its provisions were violated.

To some extent, this point is related to the previous argument that this case is not yet ripe for review. That issue has yet to be decided on remand. Until there is a ruling the twins come within the meaning of "Indian child" within the meaning of the ICWA, they are not legally "Indian" children for purposes of the ICWA. That will not occur until the hearing on the existing Indian family issues on remand. Therefore, the twins are not

"Indian" children for purposes of the ICWA at this time, and the petitions pronouncements to the contrary are misstatements of law.

Neither are the twins "Indian" children factually. They are only 3/32 Indian by "blood." Neither of their biological parents was raised in an Indian cultural setting. Richard identified himself more with his European ancestry than his Pomo genetic heritage. Bridget and Lucy are simply not "Indians." Because the petition is premised upon this erroneous factual assumption, it should be denied.

Additionally, it is not a "fact" that "the natural father of Bridget and Lucy, and Bridget and Lucy R. are now, and always have been, members of the Tribe since their birth." (Pet. p. "xiv".) The improper retroactive enrollment of Richard and the twins is one of the legal issues the R.s contested throughout the trial and continue to contest in this Supreme Court as well. More than a year after the twins' birth and placement for adoption, the tribe "resolved" on November 15, 1994, that Richard was a tribal member and the twins were eligible for membership. (CT 2107.) Neither Richard, who was born in 1972, nor his mother Karen, who was born in 1952, appear on the 1977 list of tribal members. (CT 3194-3198.) Furthermore, the Rancheria's own articles require a tribal member to have submitted an application for membership, which Richard did not do in this case. The R.s continue to contest the question of whether or not Richard was a "member since birth" of the tribe and whether or not a state court must recognize without question the tribal assertion of membership. In the event this Court does grant the petition for certiorari, the R.s request this Court determine the validity of the dubious retroactive enrollment procedure as a matter fairly included in the larger question of whether or not the twins are "Indian" children under the ICWA because resolution of this issue is a "predicate to an intelligent resolution" of this question.

(*Vance v. Terrazas*, 444 U.S. 252, 258-259, fn. 5 (1980), Sup.Ct.R. (14)(1)(a).)

Another pivotal misstatement of fact and law appears on page "xvi" of the petition which states, "Richard then sent a letter to Vista Del Mar withdrawing his consent to the adoption. . . . " Richard signed a relinquishment, not a consent. These are two separate and distinct documents under California law. A "relinquishment" is used in the agency adoption setting in this case and effects a final termination of parental rights once filed with the state Department of Social Services in Sacramento. (Cal. Fam. Code § 8700.) A "consent" is a different formal document which could be withdrawn only after a hearing at which the trial court finds it is in the child's best interest to do so. (See former California Family Code section 8815, subdivision (a) ["Consent of a birth parent to the adoption of the child by the prospective adoptive parent or parents may not be withdrawn except with court approval"] and subdivision (d) ["If the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances and that withdrawal of the consent is in the child's best interest, the court shall approve the withdrawal of the consent."].) A "relinquishment" in California is, and always has been, a much firmer and irrevocable procedure for placing a child for adoption than that involved with a "consent." A birth parent cannot "withdraw" either a relinquishment or a consent by sending a letter.

Additionally, the R.s continue to object to any reliance on the "report" of Dixie Noble (Pet. p. "xvii") in that it was never admitted into evidence; Ms. Noble never testified in court; and the R.s never has an opportunity to cross-examine her. Although it is physically present in the clerk's transcript, it never became part of the formal trial record in this case, and Ms. Noble's conclusions, which were never tested in a court of law, are irrelevant.

Because of these numerous misstatements of fact and law, the petition for writ of certiorari must be denied.

3. The Statutory Interpretation Issue Concerning the Existing Indian Family Doctrine Is Not Properly Presented to this Supreme Court for Resolution.

The fact-intensive questions surrounding the existing Indian family doctrine are not properly before this Supreme Court. As the Court of Appeal noted: "Because the trial court was persuaded that enrollment in the Tribe and tribal recognition of the twins' tribal membership were enough to trigger the application of the ICWA, the court had no occasion to make a further factual determination as to whether the biological parents maintain significant social, cultural or political relationships with the Tribe. The case must therefore be remanded so that such factual determination can be made." (*In re Bridget R., supra,* 41 Cal.App.4th at pp. 1512-1513.) Because those factual determinations are yet to be made, petitioners are asking this Supreme Court decide the question of the applicability of the existing Indian family doctrine in a vacuum. Furthermore, even though various states do not speak with one voice on this issue, the cases in which the existing Indian family doctrine has been addressed generally all possess unique fact patterns in which the various state courts apply, or reject, different versions of the doctrine within different contexts. Because these cases are so uniquely fact-based, they do not call out for review by this Supreme Court.

ICWA cases arise in the foster care context (see, *In the Matter of S.C.,* 833 P.2d 1249 (Okla. 1992); *Matter of Adoption of a Child of Indian Heritage,* 111 N.J. 155, 543 A.2d 925 (1988)); intra-family custody disputes (*A.B.M. v. M.H. & A.H.,* 651 P.2d 1170 (Alaska 1982), *cert. denied sub. nom Hunter v. Maxie,* 461 U.S. 914 (1983); *In re the Custody of A.K.H.,* 502 N.W.2d 790 (Minn.App. 1993)); voluntary adoptions (*Matter of Adoption of T.R.M.,* 525 N.E.2d 298

(Ind. 1988) *cert. denied sub. nom J.Q. v. V.D.R.L.*, 490 U.S. 1069 (1989); *In re Hampton*, 658 So.2d 331, 334-335 (La.App. 1995) *cert. denied sub. nom J.A.L. v. Hampton*, ___ U.S. ___, 116 S.Ct. 1549 (1996)); and even a custody dispute arising after artificial insemination for the purposes of gestational surrogacy *Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989) *cert. denied sub. nom Jasso v. Finney*, 494 U.S. 1030 (1990).) The context in which ICWA cases arise and the various factual situations dealing with whether or not the biological parents are domiciled on reservations or have significant, little or no connection with tribal culture compels the conclusion the resolution of these cases is best left to the various states applying their specific state statutory schemes. A careful review of the decisions from the various states reveals the law concerning the existence and applicability of the existing Indian family doctrine is still developing and, therefore, granting this petition for writ of certiorari would be premature at this time.

This case which most closely mirrors the case at bench is *Matter of Adoption of Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992). There, the biological mother had voluntarily placed her child with an agency for adoption and later sought to have her consent invalidated because it had not been taken in conformity with the ICWA. (*Id.*, at 307.) The court declined to apply the ICWA to invalidate the adoption because the minor's parents had never had any tie to any Indian tribe or community, although the mother was of Indian descent, and the child was eligible for tribal enrollment. The *Crews* court noted this conclusion was in accord with this Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), stating:

> "The [Supreme] Court stated the application of ICWA could not be defeated by the actions of the parents. In so holding, however, the court

made clear that the purpose of ICWA was to avoid the

> '[r]emoval of Indian children from their cultural setting [because such removal] seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'

"[Citation.] Thus, *Holyfield* supports our conviction that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation. In such a situation, whether or when a child meets the definition of 'Indian child' under ICWA is not controlling." (*Id.*, at 825 P.2d 310-311.)

Therefore, the *Bridget R.* ruling is consistent with the case which most closely resembles the facts presented in the instant case. Additionally, it is also important to note the various districts of the California Court of Appeal have not unequivocally decided exactly how to address the existing Indian family doctrine. Shortly after the publication of *Bridget R.*, another District of the California Court of Appeal specifically disagreed with a portion of *Bridget R.*, stating:

> "We agree with *Bridget R.* that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA. But we disagree with its holding that the doctrine *cannot* come into play unless the child *and* both his parents lack a significant relationship with Indian life. We are not willing to so limit the doctrine. As demonstrated by our review of the cases, whether there is an existing Indian family is dependent on the unique facts of each situation." (*In re Alexandria Y.*, 45 Cal.App.4th 1483, 1493, 53 Cal.Rptr.2d 679 (1996), *original emphasis.*)

The law in this area not only continues to develop around the country, but also within California. Therefore, not only is this issue not properly before this Supreme Court in this instant case because the matter was remanded for a factual hearing on this point, it is also premature for this Supreme Court to grant certiorari on this issue before any clear lines of authority develop around the country. The petition for certiorari should be denied.

4. The Question of Whether or Not Application of the ICWA to this Particular Case Denies the Twins Equal Protection of the Laws Is Not Properly Presented to this Supreme Court.

As with all the issues in this case, the equal protection question is not properly before this Supreme Court for resolution at this stage of the proceeding. The extent of the federal interest, if any, and the extent of the tribe's interest, if any, in these twins cannot be determined until the trial court holds its evidentiary hearing on these points on remand. Therefore, any opinion by this Supreme Court would be advisory only.

Furthermore, petitioners continue to rely on the inapposite case of *Morton v. Mancari*, 417 U.S. 535 (1974). The California Court of Appeal's decision in this case is consistent with settled precedents such as *Morton*, which dealt with a challenge to preferential hiring of Indians by the federal government for employment in the BIA. (*Morton v. Mancari*, 417 U.S. at. 545.) In defeating a challenge asserting the hiring preference constituted invidious racial discrimination, this Court ruled the preference was not racial discrimination but, rather, was only "an employment criterion reasonably designed to further the cause of Indian-self-government. . . . " (*Id.* at 554.) This Court noted "the preference applies only to employment in the Indian service." (*Ibid.*) *Morton* reiterated the context in which Indian legislation – which if affecting any other

ethnic group would be stricken as racially discriminatory – has been permitted is the context of reservation Indians or Indians somehow connected with a reservation coming under the purview of the federal government. (*Id.* at 552-553.) Until the trial court makes its determination on remand as to the extent to which Richard is or is not connected with tribal culture, the extent to which *Morton's* rationale is relevant here cannot be determined.

Furthermore, this Supreme Court also noted the difference between "tribal" Indians and individuals "who are racially to be classified as 'Indians' " in *United States v. Antelope*, 430 U.S. 641, 646, fn. 7 (1977) (*internal quotes omitted*) and again recently in *Oklahoma Tax Commission v. Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 2217, 2223 (1995). This Supreme Court addressed an equal protection challenge to Indian legislation in *Delaware Tribal Business Commission v. Weeks*, 430 U.S. 73 (1976), in which this Court explained it would continue to scrutinize "Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment [Citation] [and that] '[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' [Citation.]" (*Id.*, at 84.) Therefore, Federal Indian legislation is not immune from judicial scrutiny carried out in the context of a constitutional analysis. The Court of Appeal's opinion in the instant case is completely consistent with these precedents.

The Court of Appeal's opinion was correct, and consistent with the law not only from this Supreme Court, but also with the law from other jurisdictions. Most importantly, until the extent of the federal or tribal interest is determined, any ruling by this Supreme Court would be advisory only. The petitions should be denied.

5. The Issue Concerning Whether or Not the Application of the ICWA to this Case Violates the Twins' Right to Due Process of Law Is Not Properly Presented to this Court.

Although the tribe references the due process issue in the second issue in its "questions presented" portion of the petition, no comprehensive discussion of that issue is presented in the petition. However, for the sake of completeness, the R.s note the due process questions, as well, are closely tied to the result of the evidentiary hearing on remand. Because the outcome of this issue hinges on the outcome of the upcoming evidentiary hearing, the jurisdictional requirement of 28 U.S.C. section 1257 has not been met, and the petition for certiorari must be denied.

Furthermore, there is an additional ground upon which affirmance of the Court of Appeal's opinion would be proper as to this issue. The Court of Appeal also stated: "The R's, as the prospective adoptive parents, similarly have no interests which have been found to enjoy *constitutional* protection. (*Smith v. Organization of Foster Families* [citation]." (*In re Bridget R.*, 41 Cal.App.4th at 1507, *original emphasis.*) Strictly speaking, that statement is accurate. However, the R.s have always asserted they *do* have a constitutionally-protected interest against which the application of the ICWA has to be weighed. Although no case precisely has held pre-adoptive parents have such a constitutionally-protected interest, analogous cases have held that individuals in similar situations do have protected interests. (See, *Brown v. County of San Joaquin*, 601 F.Supp. 653, 664-665 (E.D. Cal. 1985); *In re Jamie G.*, 196 Cal.App.3d 675, 683, 241 Cal.Rptr. 869 (1987).) Once the relinquishments signed by Richard and Cindy were filed in Sacramento, the parental rights of the birth parents were terminated under California Family Code section 8700. At that time, because the twins' caretakers had a valid right to complete the adoption process

under state law, the R.s' interests attained constitutionally-protected status. In the event this Supreme Court grants the tribe's petition for writ of certiorari, the R.s request this Court also consider whether or not they have a constitutionally-protected due process interest in the care, custody and control of the minors as well. Because the R.s have constitutionally-protected liberty interests as well, there must be a compelling Federal interest to remove the twins from their care by applying the ICWA. Because of twins' and the parents' complete lack of connection to the Rancheria in this case, there is no such interest.

Therefore, there is no valid basis upon which to grant certiorari as to this issue either.

6. The Issues of the Effect of the Enumerated Powers Doctrine and Tenth Amendment Are Not Properly Presented to this Supreme Court.

As with all the other issues advanced by petitioners, the argument the Court of Appeal was incorrect in its Indian Commerce Clause and Tenth Amendment analysis rests on the fundamental misconception the twins at issue in this case are both "Indian" children as well as "Indian" children who have had some significant tie to a reservation or Indian culture. These are the issues to be determined on remand. Because it has not been determined yet whether or not the twins who are the subject of this case are "Indian" children, the tribes' extensive discussion of the Tenth Amendment issue is not relevant for purposes of review by this Supreme Court.

Furthermore, the Court of Appeal was correct on the substance of these points. The Indian Commerce Clause does not empower Congress to pass a law stripping a state court of its authority over a child within the geographical boundary of that state if neither the child nor the parent has any significant social connection to a reservation or Indian culture. Therefore, at the very least,

Congress exceeded its enumerated powers when it enacted those portions of the ICWA which purport to affect children of partial Indian descent whose parents are not reservation domiciliaries. 25 U.S.C. section 1911, subdivision (a), which deals with the exclusive jurisdiction of an Indian tribe "over any child custody proceeding involving an Indian child who resides on or is domiciled within the reservation of such tribe," may be within the enumerated powers of Congress. However, most of the balance of the ICWA exceeds the enumerated powers of Congress and is unconstitutional if applied to children of partial Indian descent who are not reservation domiciliaries. Certainly the attempted application of the ICWA to the twins at issue in this particular case who were not reservation domiciliaries and whose father had little or no contact with the reservation his entire life exceed the enumerated powers of Congress and is an unconstitutional application of the ICWA.

As for the Tenth Amendment issue, even though it is true the court *In the Matter of the Guardianship of D.L.L. and C.L.L,* 291 N.W.2d 278 (S.D. 1980) found no Tenth Amendment violation (*Id.* at p. 281), that case is distinguishable because it involved tribal Indians. Moreover, the analysis by the Court of Appeal in the instant case is much more extensive than that of *D.L.L.* court and relies principally on this Supreme Court's recent case of *United States v. Lopez* ___ U.S. ___, 115 S.Ct. 1624 (1995). As such, it rests on a much firmer foundation and should not be disturbed by this Supreme Court. Furthermore, *D.L.L. and C.L.L.* and the instant case are the only two cases which have addressed directly the Tenth Amendment issue in the ICWA context. Two cases do not a raging conflict make. Rather than grant the certiorari petition at this time, this Supreme Court first should permit the individual states to work this issue out in the context of specific factual situations before granting certiorari on this point

in addition to permitting the California court to resolve the factual issues presented in this specific case.

7. The Tribe Has Waived Its Preemption Arguments Because It Did Not Raise Them in the Lower Courts.

At page 14 of its petition, the tribe begins a federal preemption argument it is raising for the first time in this certiorari petition. Indeed, it has not even included that argument among the "questions presented" at the beginning of its petition. Because this issue has not been raised before, certiorari should not be granted on this point. (*Youakim v. Miller*, 425 U.S. 231, 234 (1976).)

8. The Question of Whether or Not the Twins Are Entitled to a Custody Hearing Does Not Meet the Jurisdictional Prerequisite for a Grant of Certiorari.

The tribe did not include any discussion in the petition of the fourth issue of the "questions presented," that of whether or not a custody hearing is required even if the ICWA applies. Because the tribe has provided no reason why certiorari should be granted as to this issue, this court should not grant certiorari of this question presented.

Even though the tribe presented no discussion of this issue, the R.s point out the lack of jurisdiction under 28 U.S.C. section 1257, subdivision (a), is even more apparent as to the issue of whether the twins are entitled to a hearing under California guardianship law in the event the ICWA is held to apply to this case. Until there is final determination by a California court that the ICWA applies to this case – which may never happen if the trial court on remand finds the existing Indian family doctrine precludes the application of the ICWA – no court will even need to consider whether or not a custody hearing is required. The grant of certiorari as to this issue would result in an advisory opinion only.

Even if this Supreme Court considers the issues concerning the Existing Indian Family Doctrine and whether or not the ICWA may be constitutionally applied to this case, certiorari should not be granted as to this issue because it is, at this time, too abstract for Supreme Court consideration. Not only must there still be a hearing on remand to determine whether or not the ICWA may be applied to this case, Richard must be successful at that hearing before the California trial court will reach the custody/guardianship issue.

9. The Petition Should Be Denied Because the Twins Need to Have this Matter Resolved as Expeditiously as Possible.

Finally, the R.s urge this Court to deny the petition for certiorari because it is in the best interest of all concerned to have this matter resolved as soon as possible. If the petition is granted, the inevitable result will be to prolong resolution of this matter for an additional year before retrial of the existing Indian family doctrine issues. The parties in this adoption case require resolution of these issues as soon as possible. Therefore, to expedite the resolution of this case, the petition should be denied.

CONCLUSION

Because the resolution of the issues in this case depends on the evidence adduced at trial on remand, this case does not meet the fundamental jurisdictional prerequisites for granting a petition for writ of certiorari. Furthermore, the Court of Appeal's opinion was thorough, scholarly and well-reasoned. Because it was correct in law and properly handled several difficult issues, it should not be disturbed. Finally, this Supreme Court has already denied the petition filed by Richard and Cindy

which raised, essentially, questions which were identical to those raised in the tribe's petition. The tribe's petition for a writ of certiorari should be denied as well.

Respectfully submitted,

JOHN L. DODD, ESQ.
JANE A. GORMAN, ESQ.

By: John L. Dodd, Counsel of Record for James and Colette R.

Dated: March 5, 1997

(3)

Supreme Court, U.S.
FILED
MAR 18 1997
CLERK

No. 96-828

In The

Supreme Court of the United States

October Term, 1996

DRY CREEK RANCHERIA,

Petitioners,

vs.

BRIDGET and LUCY R., JAMES R. and COLLETE R. and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

VISTA DEL MAR CHILD AND FAMILY SERVICES JOINDER IN JAMES R. AND COLETTE R.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL F. KANNE
1602 East Fourth Street
Santa Ana, California 92701
(714) 558-0700
Fax (714) 558-9220
Counsel of Record for Vista Del Mar Child and Family Service

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2 pp

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, VISTA DEL MAR CHILD AND FAMILY SERVICES, a California licensed private adoption agency, hereby joins in the Brief in Opposition to Petition for Writ of Certiorari filed by James R. and Colette R. in the above entitled matter and urges the Supreme Court to deny the Petition for Writ of Certiorari filed by Dry Creek Rancheria of the Pomo Indians for all of the reasons set forth in the Brief of James R. and Colette R.

Dated: March 12, 1997

Respectfully submitted,

MICHAEL F. KANNE
Attorney for Vista Del Mar Child and Family Services Respondent

Supreme Court, U.S.
FILED
MAR 13 1997
CLERK

CASE NO. 96-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

JAMES R. and COLETTE R., BRIDGET AND LUCY R., and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MINOR CHILDREN'S MOTION AND AFFIDAVIT OF COUNSEL FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Mitchell L. Beckloff
233 Wilshire Boulevard
Suite 400
Santa Monica, CA 90401
(310) 917-1080 - telephone
(310) 917-1081 - facsimile
Counsel of record for
Respondent Minor Children
Bridget and Lucy R.

33 pp

MOTION AND AFFIDAVIT OF COUNSEL FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent minor children, Bridget and Lucy R. hereby moves for leave to proceed *in forma pauperis* in this case and submits the following affidavit of counsel in support thereof:

I, Mitchell L. Beckloff, am counsel of record for the respondent minor children Bridget and Lucy R. in the above-entitled case. The California Court of Appeal, Second Appellate District, Division Three appointed me to represent Bridget and Lucy R. in the appellate proceedings in this matter on July 18, 1995. A copy of the court's order is attached hereto. The Los Angeles County Superior Court, State of California, also appointed counsel to represent the minor children in the proceedings before that court.

The Court has requested that Bridget and Lucy R. respond to the Petition for Writ of Certiorari filed by The Dry Creek Rancheria currently pending before this Court.

Bridget and Lucy R., the subject of these proceedings, were born in November 1993 and are just over three years old. The minor children do not have any assets to assist them in paying the fees and costs associated with filing a response in this matter. Accordingly, the minor children seek leave to proceed in this matter *in forma pauperis*.

Moreover, the minors' birth parents, Richard A. and Cindy A. are also indigent. Richard A. and Cindy A. proceeded *in forma*

pauperis before this Court concerning this same matter. Richard A. and Cindy A. filed their Petition for Writ of Certiorari to the Supreme Court of the United States *in forma pauperis.* The petition was denied. (Case No. 96-5971.)

The following responses are made on my information and belief. I have made inquiry and believe that the responses are true.

1. Are the minor children presently employed? NO. The minor children are three years old and have never been employed.
2. Have the minor children received within the past 12 months any income from a business, profession, other form of self-employment, rent payments, interest, dividends, retirement, annuity payments, alimony, welfare, social security, disability compensation, workmen's compensation, or any other source? No.
3. Do the minor children own any cash or have any checking or savings accounts? No.
4. Do the minor children own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.
5. The minor children are supported by James and Colette R., respondent parties herein. James and

Colette R. are the persons identified by Richard A. and Cindy A. to adopt the minor children.

6. Have the minor children ever filed a motion in this court for leave to proceed *in forma pauperis* in any other appeal? No.

7. The minor children have not retained an attorney to represent them. An attorney was appointed on July 18, 1995 to represent the minor children in the California Court of Appeal. (The order appointing counsel is attached hereto.)

I swear under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of March, 1997 in Santa Monica, California.

Mitchell L. Beckloff

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

In re BRIDGET R., et al. Minors.	
JAMES R. and COLETTE R., Petitioners and Appellants, v. CINDY R. and RICHARD A., Objectors and Respondents; DRY CREEK RANCHERIA, et. al., Intervenors and Respondents.	B093520 (Super. Ct. No. BN1980 consol. w/ BC114849 (John Henning, Judge)

COURT OF APPEAL - SECOND DIST.
FILED
JUL 18 1995
JOSEPH A. [illegible]
GAVINSKI Clerk
Deputy Clerk

THE COURT:

The following attorney is appointed counsel for respondent Bridget and Lucy R. on this appeal:

MITCHELL BECKLOFF

Appellant's opening brief should be filed no later than August 7, 1995. Respondent's brief must be filed no later than August 21, 1995. Appellant's reply brief shall be filed on or before August 31, 1995.

All briefs filed by amicus curiae must be filed no later than August 14, 1995. All responses to the amicus curiae briefs must be filed no later than August 31, 1995.

Presiding Justice

Attorney's Address:

MITCHELL BECKLOFF (142025)
233 Wilshire Boulevard
Suite 400
Santa Monica, CA 90401

Attorney's Phone:
(310) 917-1080

Appellant's Address:

BRIDGETT AND LUCY RUIZ
1739 Temple Avenue, #C
Long Beach, CA 90804

CASE NO. 96-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

JAMES R. and COLETTE R., BRIDGET AND LUCY R., and VISTA DEL MAR CHILD AND FAMILY SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MINOR CHILDREN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mitchell L. Beckloff
233 Wilshire Boulevard
Suite 400
Santa Monica, CA 90401
(310) 917-1080 - telephone
(310) 917-1081 - facsimile
Counsel of record for
Respondent Minor Children
Bridget and Lucy R.

QUESTIONS PRESENTED

1. Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection component of the Fifth Amendment to the United States Constitution require that the Indian Child Welfare Act of 1978 [25 U.S.C. 1901 et seq.] ("ICWA") be construed to limit its applicability to children whose parent or parents have significant social, cultural, or political connections to a federally recognized Indian tribe?

2. Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection component of the Fifth Amendment to the United States Constitution preclude a minor child's familial relationship from being determined solely, or predominantly, on the basis of race?

3. Does the Due Process Clause of the Fifth Amendment and Fourteenth Amendments to the United States Constitution guarantee procedural and substantive protection of minor child's liberty interest in their adoptive family unit even if, on remand from an appellate court, a trial court determines that the child is an Indian Child under ICWA and the federal statute permits a birth parent to withdraw an otherwise valid prior relinquishment of the child for adoption?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

STATEMENT IN OPPOSITION.....1

INTRODUCTION.....2

OBJECTION TO JURISDICTION.....4

STATEMENT OF THE CASE.....7

SUMMARY OF ARGUMENT.....11

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED AT THIS CASE IS NOT RIPE FOR SUPREME COURT REVIEW....13

II. BRIDGET AND LUCY'S OVERWHELMING NEED FOR PERMANENCE AND STABILITY REQUIRE THAT SUPREME COURT REVIEW BE DENIED AT THIS TIME.....16

III. PETITIONER'S CHARACTERIZATION OF THE HOLDING OF THE CALIFORNIA COURT OF APPEAL IS OVERBROAD.....17

IV. THE CALIFORNIA COURT OF APPEAL DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT.....19

CONCLUSION.....23

TABLE OF AUTHORITIES

United States Supreme Court Cases

Abbot Laboratories v. Gardner
387 U.S. 136 (1967).....14

Adarand Constructors, Inc. v. Pena
___ U.S. ___, 115 S. Ct. 2097 (1995).....21

Ashwander v. Tennessee Valley Authority
297 U.S. 288 (1936).....13

Minnick v. California Department of Corrections
452 U.S. 105 (1981).....6

Morton v. Mancari
417 U.S. 535 (1974).....12, 19, 20, 22

Pacific Gas & Electric Co. v. State Energy Resources
Conservation & Development Commission
461 U.S. 190 (1983).....13, 14

Poe v. Ullman
367 U.S. 497 (1961).....13, 14

Republic National Gas Co. v. State of Oklahoma
334 U.S. 62 (1948).....4, 6

Federal Statutes

25 U.S.C. section 1903, subdivision (4).....21
25 U.S.C. section 1913, subdivision (a).....10
28 U.S.C. section 1257, subdivision (a).....4, 6, 11, 13

California Court of Appeal Decisions

In re Bridget R.
41 Cal.App.4th 1483, 1522, modified,
42 Cal.App.4th 1193a (1996).....5, 9, 12, 18

CASE NO. 96-828

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE DRY CREEK RANCHERIA,
Petitioner,

vs.

JAMES R. and COLETTE R., BRIDGET AND LUCY R., and VISTA DEL MAR CHILD AND FAMILY SERVICES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

TO THE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Minor Children Bridget and Lucy R., the subject of these proceedings, by and through their counsel of record, hereby answer and oppose the petition for writ of certiorari filed by The Dry Creek Rancheria. The minors respectfully request this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, in this case.

Respectfully submitted,

Dated: March 11, 1997

MITCHELL L. BECKLOFF
233 Wilshire Boulevard, Suite 400
Santa Monica, CA 90401
(310) 917-1080 - telephone
(310) 917-1081 - facsimile
Counsel of record for Respondent
Minor Children, Bridget and Lucy R.

INTRODUCTION

This case does not involve a ruling by a California appellate court that ICWA is unconstitutional on its face or as written. It involves a ruling that ICWA may be unconstitutional if applied to certain children and their parents on the basis of their race - their genetic makeup - instead of on the basis of their political and socio-cultural ties to a federally recognized Indian tribe.

Factually this case centers around identical twins, Bridget and Lucy R., who were born on November 9, 1993 and are three years old. Bridget and Lucy live with James and Colette R. and the R.'s biological daughter, Hannah, in Columbus, Ohio. The twins have lived with the R. family for their entire lives.

Bridget and Lucy are not the biological children of James and Colette R. Richard A. and Cindy A. are the twins' biological parents.

The twins' biological parents decided to place the twins for adoption well before the twins were born. They selected James and Colette R. to be the adoptive parents of the yet unborn twins.

The twins' biological parents placed Bridget and Lucy after they were born with James and Colette R. through an adoption agency. The biological parents signed necessary paperwork and voluntarily relinquished their parental rights to the twins. Based on the biological parents' voluntary relinquishment of their parental rights under California law, the biological

parents no longer could challenge Bridget and Lucy's adoption by James and Colette R.

Some months after James and Colette P. returned to Ohio with the twins, their biological father for the first time claimed that the twins were Indians and that their adoption would violate the provisions of the Indian Child Welfare Act of 1978 [25 U.S.C. 1901 et seq.] ("ICWA"). Bridget and Lucy's biological parents demanded that James and Colette R. return Bridget and Lucy to them. The biological parents argued that because of ICWA, James and Colette R. could not adopt the twins. Petitioner, The Dry Creek Rancheria, the Indian tribe in which the twins' biological father claimed membership, intervened in the state court proceedings.

This case concerns whether the twins' biological parents and petitioner may invoke the protections of ICWA and unwind an otherwise valid adoption under state law if the biological parents have no social, cultural, or political connection to petitioner. In essence, this case is about recognizing three-year-old Bridget and Lucy as individuals and as citizens of California, instead of treating them as nothing more than a "natural resource" belonging to an Indian tribe.

Previously, this Court denied the biological parents' Petition for Writ of Certiorari to the Supreme Court of the United States (Case No. 96-5971).

OBJECTION TO JURISDICTION
(Pursuant to Supreme Court Rule of Court 15.4)

Petitioner invokes the jurisdiction of this Court through 28 U.S.C. section 1257, subdivision (a). Respondent Minor Children contend that the basis of jurisdiction relied upon by petitioner is misplaced and that this Court does not have jurisdiction under that section. Accordingly, Respondent Minor Children respectfully request that the petition for writ of certiorari be dismissed for lack of jurisdiction.

28 U.S.C. section 1257, subdivision (a) provides in pertinent part:

> "**Final judgments or decrees** rendered by highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question . . . on the ground of its being repugnant to the Constitution . . . of the United States . . . ." (Emphasis added.)

Petitioner has the burden of affirmatively establishing that jurisdiction properly rests with this Court. (Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. 62, 70-71 (1948); see also U.S. Sup. Ct. Rule 24.1(e).) "The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." (Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. at 71.)

Petitioner seeks this Court's review of a state court opinion that cannot be deemed a final judgment. The California Court of Appeal ordered that this case be remanded for further

factual determinations. Specifically, the state appellate court found that based on the trial court's ruling none of the parties was able to present evidence concerning the critical issue of whether the petitioners had a "significant social, cultural or political relationship with the Tribe." (In re Bridget R., 41 Cal.App.4th 1483, 1522, modified, 42 Cal.App.4th 1193a (1996).) The California Court of Appeal required additional fact finding by the trial court in this matter to determine whether there was sufficient factual support to justify the application of the ICWA in Bridget and Lucy's case. (Id.) No factual record currently exists to allow Supreme Court review of statutory and constitutional issues.

This is more than a matter of semantics. No final judgment exists in this case. Remand is necessary not only to resolve ambiguities left by the trial court, but also to resolve factual issues which the trial court believed were irrelevant. This Court cannot review the issues in this case without a final judgment from the state court based on all relevant evidence that will be adduced at trial upon remand.

Further proceedings in the trial court are required before there is a judgment in this matter that finally determines the rights and liabilities of the parties. Only after such factual determinations are made in the trial court and a decision is rendered based on those facts will there be a final judgment for purposes of this Court's review pursuant to 28 U.S.C. section

1257, subdivision (a). The jurisdictional statute relied upon by petitioner does not authorize interim review. Premature review of this matter will likely result in an advisory opinion.

This Court has consistently held that where additional proceedings are required in the trial court, the judgment is not yet final for purposes of Supreme Court review. (See, e.g., Minnick v. California Dep't of Corrections, 452 U.S. 105, 120 (1981); Republic Nat'l Gas Co. v. State of Oklahoma, 334 U.S. at 71-72.)

This matter is subject to additional proceedings in the trial court (unless the parties are able to settle their disputes). At the conclusion of the proceedings, the trial court's determinations will again be subject to appeal in the California Court of Appeal. Given the nature of the proceedings required by the state appellate court opinion, the matter before this Court is not a final judgment. Accordingly, the petition must be dismissed for lack of jurisdiction under 28 U.S.C. section 1257, subdivision (a).

STATEMENT OF THE CASE

Richard A. and Cindy A., are the biological parents of three-year-old identical twins, Bridget and Lucy. The twins were born on November 9, 1993 in California. (CT[1] 2023-2024, 3077, 3081.)

Prior to the twins' birth, the twins' biological parents decided to place their children for adoption. (RT[2] 620.) In August 1993, the biological parents met with an adoption attorney, Durand Cook, to discuss placing their children for adoption. (RT 889.) During the course of that conversation, Mr. Cook explained the procedures necessary to properly place an Indian child for adoption. (RT 1027, 1081-1082.) While Cindy A.'s birth parent questionaire initially indicated that Ricard A. was of Indian heritage, later Richard A. told Mr. Cook that he did not have any Indian heritage. (RT 1025-1027, 1055-1057, 1079, 1082-1083.)

Mr. Cook and the twins' biological parents never again discussed Richard A.'s heritage prior to the twins' birth. (RT 899.) James and Colette R. did not learn of the discussion about

---

[1] "CT" refers to the 19-Volume Clerk's Transcript filed in the California Court of Appeal.

[2] "RT" refers to the Reporter's Transcript filed in the California Court of Appeal.

Indian heritage between Mr. Cook and the biological parents until this litigation began.

The twins' biological parents through Mr. Cook selected James and Colette R. to be the adoptive parents of their children.

About two and one-half months after this initial meeting between Mr. Cook and the biological parents, Bridget and Lucy were born. James and Colette R. took the twins shortly after their birth to the R. home in Columbus, Ohio. (CT 2002-2003, 2040-2044, RT 408.)

On November 11, 1996, two days after the twins were born, Richard A. met with a representative of the adoption agency that was assisting in the adoption process. At that time, Richard A. signed a voluntary relinquishment of parental rights. (CT 2876-2879.) Cindy A. signed a voluntary relinquishment of parental rights on November 12, 1993. (CT 3001-3002.)

Under California law, the voluntary relinquishments of parental rights signed by the twins' biological parents surrendered and relinquished the twins to the adoption agency. The biological parents signed the relinquishments with the intent that the twins be placed with James and Colette R. for adoption. (CT 2876-2879, 3001-3002.) The relinquishment forms disclosed that after the signed form was filed with the state, all rights

to custody, services, and earnings from the child would be terminated.[3] (CT 2876-2879, 3001-3002.)

Several forms provided to Richard A. by the adoption agency specifically questioned Richard A. about his heritage and ethnicity. Richard A. did not disclose his Indian heritage on any of the forms. (CT 2856.) In fact, Richard A. knew at the time that he was lying. (RT 651.) Richard A. knew from his conversations with Mr. Cook that the twins' adoption by James and Colette R. would not proceed because of federal laws. (RT 637.)

On March 9, 1994, a representative from petitioner, the Dry Creek Rancheria, contacted the adoption agency that was involved in Bridget and Lucy's adoption and informed the agency that the twins were of Indian descent. (CT 2007.) On April 22, 1994, Richard A. wrote to the adoption agency and indicated that he wished to rescind his relinquishment. (CT 1994-1995, 2896.) Approximately one month later, the agency denied Richard A.'s request to rescind the relinquishment. (CT 2907.)

In September 1994, James and Colette R. filed an abandonment petition in the Los Angeles County Superior Court seeking to resolve the dispute between the parties. (CT 1.) Petitioner thereafter intervened and contended that the relinquishments

---

[3] A properly executed relinquishment is final upon filing with the state and can be rescinded thereafter only by the mutual consent of the relinquishing parent(s) and the licensed adoption agency. (See In re Bridget R., 41 Cal.App.4th at 1494 n. 6.)

signed by the biological parents were invalid under ICWA.[4] (CT 127.)

The trial court determined that Bridget and Lucy were Indian children as defined by ICWA. (CT 885.) Consequently, the trial court found that the twins' parents' relinquishments of their parental rights were invalid. (CT 1772.)

The California Court of Appeal reversed the decision of the trial court.

The biological parents filed a petition for writ of certiorari with this Court. This Court denied the relief requested by the biological parents. (Case No. 96-828.)

The Dry Creek Rancheria also filed a Petition for Writ of Certiorari. This Court requested that the respondent minor children file a response to the petition.

---

[4] ICWA requires that a voluntary termination of parental rights be signed in the presence of a judge and that the judge explain the terms and consequences of the termination. Further, under ICWA a voluntary termination of parental rights cannot validly be taken within 10 days of the birth of the child. (25 U.S.C. sec. 1913, subdivision (a).)

SUMMARY OF ARGUMENT

Respondent Minor Children contend that the writ petition should be denied for the following reasons:

1. No jurisdictional basis exists to allow this Court to hear this matter. 28 U.S.C. section 1257, subdivision (a) does not confer jurisdiction in this matter as there is no final judgment or decree for Supreme Court review as required by the statute relied upon by petitioners. (See Objection to Jurisdiction supra.)

2. The doctrine of ripeness counsels against Supreme Court review of this matter at this time. This Court may avoid making a constitutionally-based decision due to further proceedings that are required in the trial court.

3. The Respondent Minor Children's overwhelming need for stability and permanence requires a prompt resolution of these issues. Further trial court proceedings must be permitted to move forward immediately to reach a final judgment concerning the minors' custody. By denying review now, this Court will permit the matter to move forward in the trial court thereby allowing a final resolution (or settlement) of these matters. Thereafter, any aggrieved parties may seek appellate review of the final judgment as warranted.

4. Petitioner incorrectly asserts that the California Court of Appeal's decision "not only calls into question the constitutionality of the ICWA but all federal legislation that

applies to members of federally recognized Indian tribes." (Petition for Writ of Certiorari, p. 6, 7.) This sweeping interpretation of the state court opinion is overbroad and incorrect. The court below stated:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." (In re Bridget R., 41 Cal.App.4th at 1492.)

Contrary to petitioners' assertion, the decision does not question the overall validity of ICWA and call into question "literally every piece of legislation passed by Congress affecting Indians as tribal citizens." (Petition for Writ of Certiorari, p. 7.) By its own terms, the state court opinion is extremely limited. The opinion is relevant only in the context of an effort to use ICWA to invalidate a voluntary termination of parental rights that is otherwise valid under state law and that involves a child who is not domiciled on a reservation.

5. The California Court of Appeal decision does not conflict with principles of self-government as enunciated in Morton v. Mancari, 417 U.S. 535 (1974).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED AS THIS CASE IS NOT RIPE FOR SUPREME COURT REVIEW.

Even if jurisdiction properly lies with this Court pursuant to 28 U.S.C. section 1257, subdivision (a), as a matter of policy this Court should deny the writ petition based on considerations of ripeness. The procedural posture of this case dictates against reviewing the California Court of Appeal opinion because it may result in piecemeal adjudication before this Court. This matter has been remanded for further fact finding by the trial court. Future events will affect this controversy. Supreme Court review is not appropriate until after the matter is fully litigated and a full evidentiary record is created.

Traditionally, this Court does not decide constitutional questions unless doing so is absolutely necessary. (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) [Brandeis, J. concurring].) This Court seeks to avoid deciding constitutional issues unnecessarily. (Poe v. Ullman, 367 U.S. 497, 503 (1961).) Judicial restraint will be exercised unless a litigant has been immediately harmed or there is a threat of imminent harm. (Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 201 (1983).)

The doctrine of ripeness provides that this Court should not hear a matter until the issues have been fully litigated and there is a complete factual record before this Court to assist it in making decisions of constitutional magnitude. Under the doctrine of ripeness, two considerations must be examined: First, is whether the matter is fit for judicial decision. Second, is whether hardship to the parties will occur if court consideration of the matter is withheld. (See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 201 [quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)]; Poe v. Ullman, 367 U.S. at 509.)

A matter is fit for judicial decision by this Court only where all of the issues have sufficiently crystallized and become concrete. Abstract disagreements are not the sort of controversies that are ripe for judicial review. (Abbot Laboratories v. Gardner, 387 U.S. at 148.)

The California Court of Appeal opinion in this matter directed that further factual determinations be made. As argued in the Objection to Jurisdiction supra, there is no judgment in this case that finally determines the rights and liabilities of the parties. The controversy is ongoing and will not be resolved until there is a further evidentiary hearing. Only after such a hearing will the issues be sufficiently sharp and concrete for possible review by this Court. The factual background of this

matter must be fully explored and resolved before review by this Court is warranted.

This Court may be able to avoid a constitutional decision in this matter based on the decision of the trial court after the contemplated evidentiary hearing. Too many contingencies currently exist to warrant Supreme Court review. For example, the biological parents and petitioner may prevail upon remand and the need for Supreme Court review and a constitutional decision would be eliminated. Additionally, certain constitutional issues may be eliminated in the court below and/or additional constitutional issues will be developed and litigated. Allowing review at this early time may result in piecemeal review of Bridget and Lucy's case by this Court which will benefit no one.

In addition, petitioner has not suffered an injury based on the California Court of Appeal opinion and threat of injury is not imminent. No hardship will result if this Court withholds review at this time. The state court opinion requires additional fact finding by the trial court. Until such a hearing occurs and the trial court makes a decision based upon the facts, no party to this litigation has been harmed. Thus, prudential considerations militate against reviewing this case at this time.

II.

BRIDGET AND LUCY'S OVERWHELMING NEED FOR PERMANENCE AND STABILITY REQUIRE THAT SUPREME COURT REVIEW BE DENIED AT THIS TIME.

Bridget and Lucy are now over three years old. Based on the choice of their biological parents, the only family Bridget and Lucy have ever known are James and Colette R., their adoptive parents, and their adoptive sister, the R.'s biological daughter, Hannah. Bridget and Lucy are at the center of this controversy and yet they are completely without fault. Ironically, it is three-year-old Bridget and Lucy who are most affected by this extremely painful litigation. It is also Bridget and Lucy who will be most affected by delaying this matter with interim Supreme Court review.

Bridget and Lucy request that this Court deny review at this time so that their custody status can be finally determined in the trial court upon remand. As noted in Objection to Jurisdiction and Section I. supra, the California Court of Appeal decision requires that further hearings in this matter be held to finally determine the custody of the twins. A complete factual background for this case has not yet been developed.

Supreme Court review at this time will unnecessarily delay this matter. Interim review of Bridget and Lucy's case is unwarranted given that the trial court's fact finding will substantially affect its final judgment.

The cost of the delay associated with interim review is borne by the twins. Petitioner will certainly suffer no harm in allowing this matter to proceed to a final judgment in the trial court. If petitioner does not agree with the final judgment of the trial court, it has lost no rights to seek appropriate appellate review. In contrast, further delays in this matter will be at the psychological and emotional expense of Bridget and Lucy. This litigation must move forward so that the entire matter can be finally resolved as expeditiously as possible.

Additionally, by allowing this case to proceed, options of settlement will undoubtedly be explored between the parties. It is possible that this dispute can be resolved by settlement in a manner all parties agree is in the best interests of the twins.

III.

PETITIONER'S CHARACTERIZATION OF THE HOLDING OF THE CALIFORNIA COURT OF APPEAL IS OVERBROAD.

Petitioner would have this Court believe that every piece of federal legislation affecting federally recognized Indian tribes is in jeopardy based upon the decision of the California Court of Appeal. The California Court of Appeal decision, however, does not have the sweeping effect that petitioner now contends in its effort to have this Court review this matter. The court below stated:

> "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of - parental rights respecting an Indian child

> who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe." (In re Bridget R., 41 Cal.App.4th at 1492.)

The decision below does not question the overall validity of ICWA or any federal legislation affecting members of federally recognized Indian tribes. By its own terms, the state court opinion is quite limited. The opinion is relevant only in the context of a challenge under ICWA to a voluntary termination of parental rights that is otherwise valid under state law. Moreover, the termination of parental rights has to involve a child who is not domiciled on an Indian reservation.

The California Court of Appeal decision confronts the constitutional challenges involved in this case directly and thoroughly discusses them. The issues were completely briefed in response to a specific briefing order from the California Court of Appeal. The appellate court opinion sensitively balances the competing rights of Bridget and Lucy, the biological parents, and petitioner. The court did not make sweeping constitutional pronouncements calling into question all federal legislation affecting members of federally recognized Indian tribes.

As noted supra, the California appellate court decision is quite narrow. With regard to equal protection violations, the court merely found that certain children with some Indian ancestry are denied equal protection if they are classified as Indian Children by ICWA without a more significant tie between

the child's parent or parents and the Indian Tribe. With regard to due process, the court found that due process was violated only where an adoptive placement has been made, the placement is valid under state law, and the placement is later challenged under ICWA.

Contrary to the petitioner's statements, the California Court of Appeal decision is limited and its effect will be felt in very few cases. The court did not strike down ICWA as written or find that ICWA cannot be applied unless it is severely restricted in its application. Petitioner's claims are simply an effort to secure Supreme Court review where such review is unwarranted.

IV.

THE CALIFORNIA COURT OF APPEAL DECISION DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT.

Petitioner claims that the lower court decision conflicts with the principles of self-government as enunciated in Morton v. Mancari, 417 U.S. 535 (1974). Petitioner's claim must be rejected.

Morton v. Mancari, 417 U.S. at 535, deals with a challenge by non-Indians to a statutory employment preference for qualified Indians in the Bureau of Indian Affairs ("BIA"). The federal statute in question concerned tribal Indians and their participation in their government. Non-Indians challenged the statute as violative of the equal protection component of the

Fifth Amendment to the United States Constitution. This Court noted that the purpose of the law was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." (Id. at 542.) At the time the legislation in question was passed, Congress was attempting to remedy the situation where the "non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." (Id.) Congress sought to promote Indian self-government by increasing tribal participation in the BIA. (Id. at 544.)

This Court rejected the equal protection challenge to the hiring preference. This Court held that the employment preference in the challenged statute did not constitute "racial" discrimination because the employment preference did not constitute a racial preference. The preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives are governed by the BIA in a unique fashion." (Id. at 554.)

The recipients of the benefit were individuals living on or near a reservation with a high quantum of "Indian blood" who were also members of federally recognized tribes. Because many individuals of Indian ancestry were excluded from the class of tribal members entitled to the employment preference, this Court concluded that the classification in Morton v. Mancari was

political, and not based solely on race. Therefore, this Court sustained the preference after rational basis review.

ICWA, as written, does not apply to all children who have some degree of Indian ancestry, but only to children who have a political connection to a federally recognized tribe. "Indian child" is defined as

> . . . any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. sec. 1903, subd. (4).)

The application of ICWA to cases like Bridget and Lucy's, however, raises questions about the extent to which ICWA may be applied after an otherwise valid state adoptive placement to children whose ties, and whose parents' ties, to a tribe are solely, or predominantly, blood based. To the extent that these ties become for non-reservation individuals of Indian ancestry less and less political and more and more racial, the purported reach of ICWA raises questions about whether ICWA, as applied, may create racially-based classifications of children which would be subject to strict scrutiny, and not simply rational basis review, under Equal Protection analysis. (Adarand Constructors, Inc. v. Pena, __ U.S. ___, ___, 115 S. Ct. 2097, 2111-2113 (1995).)

The degree of tribal connection and its relevance for determining the scope of ICWA is precisely the issue that will be determined on remand. Where a child's parents have some social,

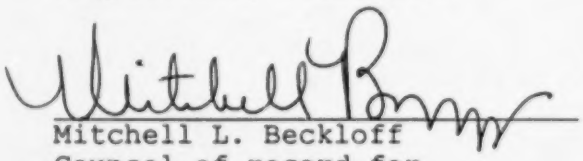
cultural, or political connection to a tribe, ICWA does not violate equal protection principles based on this Court's prior decisions. Where, however, a child's parent or parents appear to have no connection to a tribe, the rationale of Morton v. Mancari does not apply -- the classification cannot be said to relate to some greater tribal issue because of the lack of connection between the parents and tribe. It is this distinction that the California Court of Appeal decision precisely draws.

CONCLUSION

Based on the foregoing, Respondent Minor Children Bridget and Lucy R. respectfully request that this Court deny the petition for writ of certiorari filed by The Dry Creek Rancheria.

Respectfully submitted,

Dated: March 11, 1997



Mitchell L. Beckloff
Counsel of record for
Respondent Minor Children
Bridget and Lucy R.

Supreme Court, U.S.
FILED
MAR 18 1997
CLERK

No. 96-828

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD A. and CINDY A., Petitioners,

v.

JAMES R. and COLLETTE R.,
and VISTA DEL MAR CHILD AND FAMILY SERVICES, Respondents.

MOTION FOR LEAVE TO FILE IN FORMA PAUPERIS

Janette Freeman Cochran, Esq., #102643
215 N. Marengo Ave., Third Floor
Pasadena, CA 91101-1503
Attorney for Respondent RICHARD A.
(818) 584-9823

Robert S. Gerstein, Esq., #35941
1717 Fourth Street, 3rd Floor
Santa Monica, CA 90401-3319
Attorney for Respondent CINDY R.
(310) 393-5582

Attorneys for Petitioners
RICHARD A. and CINDY R.
By appointment of the Court of Appeal under the California Appellate Project on an independent basis

16 pp

The Respondents ask leave to file the attached Response to Petition for Writ of Certiorari *in forma pauperis*.

Respondents have previously been granted leave to proceed *in forma pauperis* in the following courts:

1. Court of Appeal of the State of California
2. Los Angeles Superior Court, State of California.

Respondents' Affidavit or Declarations in support of this Motion are attached hereto.

DATED: March 12, 1997

Janette Freeman Cochran, Esq,
Robert S. Gerstein, Esq,

By _____
Robert S. Gerstein

Attorneys for Respondents
RICHARD A. and CINDY R.

AFFIDAVIT OR DECLARATION IN SUPPORT OF

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, **CINDY RUIZ**, am the Petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes ■ No □

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   Net Pay: $836.00 per month.
   Employer: PJB & Co. Electrical Contractor
   1899 No. Obispo Ave., Signal Hill, CA 90804

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. **N/A**

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes □ No ■

3. Do you own any cash or have a checking or savings account? Yes ■ No □
   $300.00 in savings account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ■ No □
   1984 Ford Tempo Automobile, value $1,500.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Son, Anthony, Age 5 and Son, Richard, Age 4

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 7, 1997.

Cindy Ruiz

Cindy Ruiz

AFFIDAVIT OR DECLARATION IN SUPPORT OF

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, **RICHARD ADAMS**, am the Petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes ■ No □

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer: Net Pay: $860.00 per month.
   Employer: Stanley Smith
   12138 Firestone Boulevard
   Norwalk, CA 90650

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. **N/A**

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?
   Yes □ No ■

3. Do you own any cash or have a checking or savings account? Yes □ No ■

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ■ No □
   1984 Ford Tempo Automobile, value $1,500.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Son, Anthony, Age 5 and Son, Richard, Age 4

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 7, 1997.

Richard Adams

No. 96-828

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD A. and CINDY A., Petitioners,

v.

JAMES R. and COLLETTE R.,
and VISTA DEL MAR CHILD AND FAMILY SERVICES, Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Janette Freeman Cochran, Esq., #102643
215 N. Marengo Ave., Third Floor
Pasadena, CA 91101-1503
Attorney for Respondent RICHARD A.
(818) 584-9823

Robert S. Gerstein, Esq., #35941
1717 Fourth Street, 3rd Floor
Santa Monica, CA 90401-3319
Attorney for Respondent CINDY R.
(310) 393-5582

Attorneys for Petitioners
RICHARD A. and CINDY R.
By appointment of the Court of Appeal under the California Appellate Project on an independent basis

TOPICAL INDEX

I. PARENTS ASK THIS COURT TO GRANT THE DRY CREEK RANCHERIA'S PETITION BECAUSE, AS CONGRESS FOUND, YOUNG INDIAN COUPLES IN THEIR POSITION NEED THE HELP OF THEIR TRIBES TO MAINTAIN THE STABILITY OF THEIR FAMILIES 1

II. THIS COURT HAS JURISDICTION TO GRANT THE PETITION BECAUSE THE JUDGMENT FINALLY DEPRIVES THE TRIBE OF ITS AUTHORITY TO DEFINE ITS OWN MEMBERSHIP FOR PURPOSES OF ICWA 3

III. THE STATUTORY AND CONSTITUTIONAL ISSUES IN THIS CASE ARE RIPE FOR REVIEW 5

IV. RANCHERIA HAS NOT MISSTATED THE LAW OR THE FACTS 6

V. THIS COURT CAN BRING THIS CASE TO A SPEEDY CONCLUSION AND CREATE ORDER OUT OF THE CURRENT CHAOS IN THE INTERPRETATION OF ICWA BY REJECTING THE "EXISTING INDIAN FAMILY" EXCEPTION 8

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Abney v. United States (1977)
431 U.S. 651 5

Cox Broadcasting Corp. v. Cohn (1975)
420 U.S. 469 3

Helstoski v. Meanor (1979)
442 U.S. 500 4

Mississippi Band of Choctaw Indians v. Holyfield,
490 U.S. 30 ..... 2, 4, 5

Radio Station WOW v. Johnson,
326 U.S. 120 3

Santa Clara Pueblo v. Martinez,
436 U.S. 49 4

FEDERAL STATUTES

25 U.S.C. §1902 3

25 U.S.C. §1903(4) 6

25 U.S.C. §1911(d) 4

25 U.S.C. §1913 7

25 U.S.C. §1914 7

RULES

United States Supreme Court Rule 15(2) 6

No. 96-5971

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1996

RICHARD A. and CINDY A., Petitioners,

v.

JAMES R. and COLLETTE R.,
and VISTA DEL MAR CHILD AND FAMILY SERVICES, Respondents.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

I. PARENTS ASK THIS COURT TO GRANT THE DRY CREEK RANCHERIA'S PETITION BECAUSE, AS CONGRESS FOUND, YOUNG INDIAN COUPLES IN THEIR POSITION NEED THE HELP OF THEIR TRIBES TO MAINTAIN THE STABILITY OF THEIR FAMILIES.

Parents Cindy R. and Richard A.[1] support Dry Creek Rancheria's Petition because of their belief that young Indian parents (and expectant parents) in the position of Parents

---

[1]The Parents are parties to this proceeding. (Petition at p. 11.)

here need the help of their tribes to maintain the stability of their families. Such couples need the help of those who know and appreciate their tribal heritage to learn that there are ways of coping with the pressures of urban life other than giving up their children for adoption outside of the tribe, conduct which impoverishes their tribes, their own lives and the lives of their children.

Further, this Court has held that the rights of the tribe cannot be defeated by the actions of individual members: "Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 at p. 50 (1989). Tribes should have the authority to define their own membership, and ICWA requires that their definitions be given "full faith and credit." If, on the contrary, the "existing Indian family exception" is accepted, individual parents will have the power to rob their tribes of future generations, and their children of their tribal heritage, by their own neglect of their tribal ties.

If parents must qualify as "existing Indian families" in order to receive the protection of ICWA, tribal help will be denied to those who need it most: those who have not been able to develop strong social, political and cultural ties with their tribes on their own. Thus, the irony of the "existing Indian family exception" is that it ensures tribal guidance to Indian parents in *inverse* proportion to their need for that guidance.

Here, Parents were persuaded by an unscrupulous attorney to relinquish their children in the absence of the tribal support and guidance which ICWA was intended to ensure them. To rule that the tribe is bound by that relinquishment unless they can show that Parents had substantial social, cultural and political ties with the tribe at that time is

to guarantee that ICWA will be ineffectual "to promote the stability and security of Indian tribes and families," 25 U.S.C. §1902, precisely where it is needed most.

II. THIS COURT HAS JURISDICTION TO GRANT THE PETITION BECAUSE THE JUDGMENT FINALLY DEPRIVES THE TRIBE OF ITS AUTHORITY TO DEFINE ITS OWN MEMBERSHIP FOR PURPOSES OF ICWA.

Respondents James and Colette R. contend that this Court does not have jurisdiction to grant the petition because the order of the Court of Appeal remands the case to the trial court to determine whether Parents had "an existing Indian family" at the time they relinquished the twins (R.'s Opposition to Petition, pp. 12-17).

But this case falls into two of the categories which this Court has held to comprise the "penumbral area" of finality, *Radio Station WOW v. Johnson*, 326 U.S. 120 at 124 (1945), justifying the conclusion that the Federal issues raised here *have* been decided finally for purposes of this Court's review, though there will be further state court proceedings.

Taking a "pragmatic approach," *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 at 486, this Court has held there is sufficient finality where the "... federal issue ... will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 480. Further, this Court has held that the state court decision is final for purposes of review where the ensuing state proceedings would themselves violate the Federal right asserted. *Helstoski v. Meanor* (1979) 442 U.S. 500.

Such is the case here. Under the terms of the Court of Appeal decision, Parents and the Rancheria have no alternative except either (1) to give up children who are Indian children according to the explicit language of ICWA or (2) to accept the burden of proving to the trial court that they are "Indian" enough to qualify for the "existing Indian family" exception. Even if Parents prevail at the "existing Indian family" hearing on remand, therefore, the childrens' tribe -- the Rancheria -- will have lost: it will have lost the vital capacity to *define itself* by defining its own membership.

A "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 at 72, footnote 32. So too, one purpose of ICWA is to ensure that the fate of Indian children is not decided by "nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 at 34-35 (1989) (quoting the testimony of Chief Calvin Isaac). ICWA achieves that purpose by requiring state courts to give "full faith and credit" to the tribe's own definition of membership. 25 U.S.C. §1911(d).

Whatever the outcome of the trial court proceedings on remand, then, the very exercise of the trial court's authority to decide whether Parents were an "existing Indian family" will deprive the Rancheria of its right to define tribal membership, and in particular, to define and ensure the future of the Rancheria by deciding for itself which children shall be counted as members.

Whatever the outcome of those proceedings, it will remain true that the question of the Rancheria's membership has been submitted to "nontribal government authorities who

have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing," *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 34-35, *supra*.

Because the California court's imposition of the "existing Indian family exception" is now a final adjudication denying the Rancheria its right to define itself for purposes of ICWA, this Court has jurisdiction to review it now. *Abney v. United States* (1977) 431 U.S. 651 at 659.

III. THE STATUTORY AND CONSTITUTIONAL ISSUES IN THIS CASE ARE RIPE FOR REVIEW.

Respondents further assert that the issues of statutory and constitutional interpretation raised by the Petition are not ripe for review because those issues are presented in an abstract rather than a concrete form (R.'s Brief in Opposition to Petition, pp. 2028).

This assertion is untrue. This case presents the "existing Indian family" issue in a concrete situation. As shown above, the decision below would deprive the Rancheria of the concrete right to define its own membership. It is therefore ripe for review.

Indeed, Respondent R.'s assertion that this case is not ripe for review on the constitutional and statutory issues is belied by their own description of the opinion below and the process which gave rise to it:

> ... [T]he California Court of Appeal opinion was thorough, scholarly, and correct legally. The Court of Appeal had the benefit of extensive briefing and the assistance of numerous amicus curiae briefs from various organizations throughout the nation. In contrast to various other state court opinions in which the constitutional issues have been dealt with in a summary fashion, this particular opinion includes extensive

analysis of these issues after thoughtful consideration of the most recent opinions from the Supreme Court.

R.'s Brief in opposition, pp, 11-12.

The factual record necessary for appropriate consideration of the issues the Rancheria raises here was made in the trial court. It was established as matter of fact that Bridget and Lucy are the biological children of a father who has been a member of Dry Creek Rancheria since birth, and that, as lineal descendants of historic members of the Rancheria, Bridget and Lucy are eligible for membership in the Rancheria (Opinion, p. 8). They are, therefore, Indian children according to the explicit language of the ICWA definition in 25 U.S.C. §1903(4), and, but for the application of the "existing Indian family" gloss, the Rancheria would have had the authority under ICWA to ensure that they would not be lost to the tribe.

IV. RANCHERIA HAS NOT MISSTATED THE LAW OR THE FACTS.

R.'s assert that the Petition should be denied under this Court's Rule 15(2) because Petitioners have misstated facts and law (Respondent R.'s Brief in opposition, p. 17, *et seq.*). In reality, however, they have failed to show any such misstatement.

First, R.'s assert that the Rancheria's description of Bridget and Lucy as "Indian children" is an egregious misstatement (Brief in Opposition, p. 17). However, they contradict the opinion they seek to defend. The Opinion stated "undisputed" that "the twins are now recognized by the Tribe as tribal members." (Opinion, p. 5.)

The fact is that Bridget and Lucy clearly fall within ICWA's definition of Indian children as stated in 25 U.S.C. §1903(4), and are therefore "Indian children" within the

meaning of ICWA. The decision below would impose the "existing Indian family exception" as a limit on the enforceability of ICWA, and would therefore mean that Bridget and Lucy would be denied ICWA's protection unless the trial court finds that their family meets the requirements of the exception. The fact that the twins would be denied the protection of ICWA by operation of the exception does not, however, mean that they cease to be *Indian children* within the clear meaning of the Act.

Second, R.s assert that it is not a fact that Father has been a member of the Dry Creek Rancheria since birth (Brief in Opposition, p, 18). On that point, however, they contradict the opinion they seek to defend. The Court of Appeal opinion itself recites that Father, as a "lineal descendent of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth" (Opinion, p. 7). It is R.s who misstate the facts, with their erroneous claim that they can continue to contest the issue of Father's membership in the Rancheria in this Court.

Respondents also assert that the Rancheria engaged in a "pivotal misrepresentation" when it said that Father conveyed a "withdrawal of his consent to the twins' adoption...," because Father had signed what is technically called a "relinquishment" rather than "consent" (Brief in Opposition, p. 19). This is nonsense. The Opinion specifically states that the parents "purportedly withdrew their consent." (Opinion, p. 5) That is also the terminology of the ICWA (25 U.S.C. §§1913, 1914.) The Rancheria made it clear that both Parents signed "relinquishments" (Petition, p. xvi). In later stating that Father had withdrawn "his consent to the twins' adoption," the Rancheria, like the Court of Appeal, was using the phrase descriptively, not technically. No one could possibly be misled by this common-sense description of what occurred.

Finally, the R.s object to a reference to the report filed with the trial court by Dr. Dixie Noble (Brief in opposition, p. 19). Though not denying that the report was filed, or that its content was accurately reported. R.s insist that is irrelevant. As the reference was made only in passing, and has no direct relevance to the vital issues the Petition puts before this Court, the R.s' objection is irrelevant, and should have no bearing on this Court's decision on the Petition.

V. THIS COURT CAN BRING THIS CASE TO A SPEEDY CONCLUSION AND CREATE ORDER OUT OF THE CURRENT CHAOS IN THE INTERPRETATION OF ICWA BY REJECTING THE "EXISTING INDIAN FAMILY" EXCEPTION.

Parents join the R.s in believing that this case should be concluded as speedily as possible in the interests of their children. Parents do not agree, however, that this goal will be achieved by this Court's rejection of the Rancheria's Petition (R.'s Brief in Opposition, p. 29).

The R.s ignore the fact that Bridget and Lucy currently face an extensive proceeding on remand which can only be avoided if this Court grants review and rejects the "existing Indian family" doctrine and the Court of Appeals other Constitutional arguments, thereby bringing the entire case to a speedy close.

///

///

///

///

///

CONCLUSION

For the reasons stated above, Parents support the Rancheria's Petition and respectfully request that this Court grant it.

DATED: March 12, 1997

Respectfully submitted,

Janette Freeman Cochran, Esq,
Robert S. Gerstein, Esq,

By _____
Robert S. Gerstein

Attorneys for Respondents
RICHARD A. and CINDY R.

Supreme Court, U.S.
FILED
APR 2 1997
CLERK

(4)

No. 96-828

In The

Supreme Court of the United States

October Term, 1996

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

IN RE BRIDGET and LUCY R., minors, CINDY R. and RICHARD A., JAMES and COLLETTE R., and THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District, Division Three

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

LESTER J. MARSTON
(Counsel of Record)
RAPPORT AND MARSTON
200 W. Henry Street
Post Office Box 488
Ukiah, California 95482
Telephone: (707) 462-6846
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS:

I. THE TWINS AND RICHARD A. ARE INDIANS WITHIN THE MEANING OF THE ICWA AND RICHARD A. NEVER VALIDLY CONSENTED TO THE ADOPTION OF HIS CHILDREN 2

A. The Twins And Richard A. Are Indians Under Tribal Law 2

B. Richard A. And The Twins Are Indians As Defined By Congress Under The ICWA 3

C. Richard A. Never Validly Consented To The Adoption Of The Twins 4

II. THE CALIFORNIA COURT OF APPEALS DECISION IS FINAL FOR PURPOSES OF THIS PETITION 5

III. THE TRIBE NEVER ABANDONED ITS FEDERAL PREEMPTION ARGUMENT 8

IV. THE INTERESTS OF THE MINORS WOULD BEST BE SERVED IF THE COURT GRANTED THE TRIBE'S PETITION 9

TABLE OF CONTENTS – Continued

Page

V. THIS COURT SHOULD GRANT THE TRIBE'S WRIT FOR ALL THE REASONS SET FORTH IN THE TRIBE'S PETITION 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Federal Cases

California v. Zook, 336 U.S. 725 (1949) 8

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 2

Cox Broadcasting Corporation v. Cohen, 420 U.S. 469 (1975) 1, 5

Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) 2

Hines v. Davidowitz, 312 U.S. 52 (1941) 8

Roth v. Burney, 168 U.S. 218 (1897) 2

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 2

United States v. Wheeler, 435 U.S. 313 (1978) 2

State Cases

In Re Bridget R., 42 Cal. App. 4th 1483 (1996) 6, 7

Statutes

28 U.S.C. §1257 1

25 U.S.C. §1913(a) 4, 5, 7

25 U.S.C. §1903(3) 4

INTRODUCTION

In an obvious attempt to confuse the issues and draw this Court's attention away from the real reasons why this Court should grant petitioner's Petition for Writ of Certiorari (i.e., the decision of the Court below violates the Indian Child Welfare Act ("ICWA"), conflicts with the decisions of the highest courts of other states which have rejected the "existing Indian family" exception to the ICWA, prevents the uniform application of federal law throughout the United States and frustrates the overriding federal policy adopted by Congress in the ICWA) the respondents, and each of them, essentially make three arguments in support of their position that the Writ of Certiorari should be denied by this Court: (1) that neither Bridget and Lucy R. ("the twins"), nor their father, Richard A., are Indian, and that Richard A. signed, in the first instance, a valid "relinquishment" not a "consent" to the adoption; (2) that the decision below is not final since the issue of the existence of the "existing Indian family" exception was remanded to the trial court; (3) that the petitioner ("Tribe") abandoned its federal preemption argument below and, therefore, cannot raise it now before this Court; and (4) that the interests of the twins would best be served by this Court denying the petition.

In this brief, petitioner shall demonstrate: (1) that the twins and Richard A. are Indians and that Richard A. never validly consented to the adoption of his children; (2) that the decision of the Court below is final within the meaning of 25 U.S.C. § 1257, as interpreted by this Court in *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469 (1975) ("*Cox*"); (3) that the Tribe argued in the Court

below that the "existing Indian family" exception doctrine was preempted by the provisions of the ICWA and, therefore, has the right to raise that argument before this Court, and (4) that the interests of the twins would best be served by this Court granting the petition so that they can be reunited with their natural parents at a critical stage in their development.

ARGUMENT

I.

THE TWINS AND RICHARD A. ARE INDIANS WITHIN THE MEANING OF THE ICWA AND RICHARD A. NEVER VALIDLY CONSENTED TO THE ADOPTION OF HIS CHILDREN.

A. The Twins And Richard A. Are Indians Under Tribal Law.

This Court has consistently recognized that an Indian Tribe has the authority to determine its own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roth v. Burney*, 168 U.S. 218 (1897). Tribal membership requirements may be established by usage, written law, treaty with the United States, or even by inter-Tribal agreement. *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904).

The power of an Indian Tribe to determine questions of its own membership derives from the Tribe's sovereign powers as a distinct political entity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). A "Tribe's right to define its own membership for Tribal purposes has long

been recognized as central to its existence . . . . [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters." *Id.*

Despite respondents' assertion to the contrary, Richard A. and the twins are Indians as defined by Tribal law. The Tribe is federally recognized and organized under Articles of Association ("Constitution") which were approved by the Secretary of the Interior on August 22, 1979 (RT 1217). Prior to the adoption of the Constitution, the Tribe governed itself in accordance with its customs and traditions (RT 1248). Under those customs, any lineal descendant of a person whose name appears on the Tribe's original June 4, 1915 Tribal roll was considered a member of the Tribe at birth. (RT 18).

Richard A. is a lineal descendant of a Tribal member from the 1915 roll. Under Tribal law, he is now, and since birth, has always been, a member of the Tribe. (RT 354-355). As direct lineal descendants of Richard A., the twins, born after the adoption of the Tribe's Constitution, were eligible for membership in the Tribe. Karen A., submitted the twins' application for enrollment, under the Tribe's Constitution, on or about March 4, 1994, which was subsequently approved by the Tribe. (CT 3052-3056.) Under Tribal law, the twins are, therefore, enrolled members of the Tribe. (RT 354-355.)

B. Richard A. And The Twins Are Indians As Defined By Congress Under The ICWA.

Pursuant to its plenary power under the Indian Commerce clause, Congress, under the ICWA, has defined an Indian as any person who is a member of an Indian Tribe

(25 U.S.C. § 1903 (3)) and defined an "Indian child" as a member of an Indian Tribe *or* any person who is eligible for membership in an Indian Tribe and who is the biological child of an Indian Tribal member (25 U.S.C. §1903 (4)).

As shown above, Richard A. has been a member of the Tribe since his birth. He is, therefore, an Indian as defined by Congress under the ICWA. The twins were eligible for membership in the Tribe at the time of their birth and were subsequently enrolled in the Tribe. They are, therefore, Indian children, as defined by Congress under the ICWA.

C. Richard A. Never Validly Consented To The Adoption Of The Twins.

The respondents continue to refuse to recognize that this case is governed by the ICWA, rather than state law. It makes no difference, for purposes of federal law, whether Richard A. signed a "relinquishment" or "consented" to the adoption of his minor children under state law. As the father of Indian children, under the ICWA, Richard A. could not "relinquish" or validly give his "consent" to the adoption of his minor children unless the "relinquishment" or "consent" was "executed in writing and recorded before a judge of competent jurisdiction, . . . accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained" and understood by [Richard A.]. (25 U.S.C. §1913 (a)).

The record in the Court below is clear. Richard A. never executed the "relinquishment" in conformity with the provisions of the ICWA. Consistent with the ICWA,

Richard A. may withdraw the relinquishment "at any time and, upon such withdrawal," his children " shall be returned" to his custody. (25 U.S.C. §1913 (b)).

As set forth above, the Tribe has demonstrated that its petition does not contain misstatements of law or fact. Having clearly shown that the statement of the case contained in the Tribe's petition is accurate, the Tribe will now respond to respondents' substantive legal arguments.

II.

THE CALIFORNIA COURT OF APPEALS DECISION IS FINAL FOR PURPOSES OF THIS PETITION.

In *Cox* this Court established specific exceptions to the final judgment rule:

> . . . but as the cases have unfolded, the Court has reoccurringly encountered situations in which the highest court of a state has finally determined the federal issue presented in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state court.
>
> * * *
>
> . . . there are cases such as Radio Station WOW, supra, and Brady v. Maryland, [citation omitted] in which the federal issue, finally decided by the

> highest court of the State, will survive and require decision regardless of the outcome of further state court proceedings.

Id., at 477-480.

This case clearly falls within this exception. First, the Court below has ruled that without the judicially created "existing Indian family" exception, the ICWA "runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the States; (2) it improperly interferes with Indian children's fundamental due process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children . . . ". *In Re Bridget R.*, (1996) 41 Cal. App. 4th 1483, 1512. This Judgment is plainly final on the federal issue and is not subject to further review in the state courts. The issue of determining whether Richard A. and the twins have any significant social, cultural, or political ties to the Tribe has been remanded to the trial court. If Richard A. cannot prevail at trial, then the trial court will hold that the provisions of the ICWA do not apply to this case and Richard A. will be deprived of the custody of his minor children.

Second, even if Richard A. prevails at trial on the ICWA issues, he must still demonstrate to the trial court that a return of custody of his minor children to him will not cause the minors any harm.

> . . . we believe it would constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement, based on statutory violations

> which occurred in making the placement, without a hearing to determine whether the child would suffer harm if removed from that placement. . . . such a constitutional mandate cannot be avoided by reliance on the *statutory* provisions of ICWA (original emphasis).

Id. at 1517.

Finally, even if Richard A. were to prevail at trial on all of these issues and make unnecessary further consideration of the constitutional questions, there would still remain in effect the unreviewed decision of the California Court of Appeals that young children, who clearly fall within the ICWA definition of an "Indian child", are not afforded the protections of the ICWA unless or until they prove at trial that they come within the judicially created "existing Indian family" exception.

Delaying final decision on the Fifth, Tenth, and Fourteenth Amendment claims until after trial would leave unanswered whether the ICWA is constitutional without the "existing Indian family" exception, leave to state courts to determine on a piece-meal basis whether the ICWA without the exception is constitutional and would further erode the strong federal policy adopted by Congress in the ICWA to protect the removal of Indian children, as *defined by Congress,* under the ICWA from their Indian families.

On the other hand, if this Court grants the Tribe's petition and rules: (1) that the ICWA is constitutional without the "existing Indian family" exception and (2) that the provisions of 25 U.S.C. §1913 require the return of the twins to Richard A., then this litigation is over.

Because the issue of the constitutionality of the ICWA "could survive" in this case "regardless of the outcome of further state court proceedings," this case falls within the second exception to the finality rule established in *Cox* and this Court has jurisdiction to hear this case.

III.

THE TRIBE NEVER ABANDONED ITS PREEMPTION ARGUMENT.

State law is preempted by federal law "if the state law conflicts with [federal law] (*California v. Zook*, 336 U.S. 725, 731 (1949)) or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

For respondents to argue that the Tribe abandoned its federal preemption argument is absurd, given the record in this case. Before the California Court of Appeals and the California Supreme Court, the Tribe argued that the "existing Indian family" exception doctrine violated the provisions of the ICWA and were inconsistent with the Congressional policies and objectives embodied in the Act.

The fact that the Tribe is now using the word "preemption" in framing its arguments does not alter the fact that throughout these proceedings, the Tribe argued that the decision below violated federal law (i.e., was preempted). Because the Tribe never abandoned this argument below it is not precluded from raising it now.

IV.

THE INTERESTS OF THE MINORS WOULD BEST BE SERVED IF THE COURT GRANTED THE TRIBE'S PETITION

James and Colette R. have custody of the twins only because federal law was violated. If the California Court of Appeals had not issued a stay of the Superior Court's Order, visitation between the twins and the natural parents would have continued and a reunification plan implemented that would have reunified the twins with their natural parents.

The twins are now 3½ years old. They are at a stage in their lives when they are beginning to develop an identity separate from their primary caretakers. Through a structured reunification plan, the Tribe asserts that the twins could be reintroduced to their natural parents and allowed to form a parent-child bond without causing them serious emotional harm. The Tribe believes that it is in the best interests of the twins to have the full association of their natural parents, grandparents, and the Tribe. Only by knowing their ethnic and cultural identity and participating in their Tribal government, as Tribal citizens, can the twins develop a strong, positive image of themselves.

The Tribe agrees with the respondent that it is in the twins' best interests to have this matter resolved as soon as possible. Rather than have all of the parties, including the twins, go through a lengthly hearing before the trial court on remand to determine whether the ICWA applies in this case, this Court should grant the Tribe's petition. By granting its Writ, this Court will expedite, not delay, the conclusion of this case which, even the respondents admit, is in the best interests of the twins.

V.

THIS COURT SHOULD GRANT THE TRIBE'S WRIT FOR ALL THE REASONS SET FORTH IN THE TRIBE'S PETITION.

In its petition, the Tribe amply demonstrated to this Court that this case poses important issues of federal Indian law that have not been previously addressed by this Court but which should be addressed in order to resolve the conflict between the highest courts of the States on this issue of whether the ICWA violates the United States Constitution. The respondents opposition should not divert the Court's attention away from the real reasons why this Court should grant the Writ. This Court should grant this Writ to resolve the conflict between the state courts on this issue and to ensure that the full purposes and objectives of Congress in adopting the ICWA as a uniform national policy are not frustrated.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the petition, if and when the Court acts on the Petition for Writ of Certiorari, the Petition should be granted.

Dated this 1st day of April, 1996.

Respectfully submitted,

LESTER J. MARSTON
Counsel of Record
RAPPORT AND MARSTON
Attorneys for Petitioner
Dry Creek Rancheria